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1609 1603

United States Circuit Court of Appeals

For the Ninth Circuit.

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,

Appellant and Cross-Appellee,

vs.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,

Appellees and Cross-Appellants.

Transcript of Record.

Upon Appeal and Cross-Appeal from the United States Court for China.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

APPEARANCES:

Messrs. KENT & MOUNSEY, Tientsin, China,
For Plaintiffs.

Messrs. FLEMING, FRANKLIN & ALLMAN,
26 The Bund, Shanghai, China,
For Defendant.

In the United States Court for China.

Cause No. 3067—Civil No. 1293. Complaint. Filed at Shanghai, China, April 27, 1928. (Sd.) L. T. Kenake, Assistant Clerk.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LTD., BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,

Plaintiffs,

vs.

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INCORPORATED,

Defendant.

COMPLAINT.

Come now the plaintiffs and, complaining of the defendant, for cause of action declare that:

1. The plaintiffs are banking institutions of Chinese nationality with the exception of the Banque Franco-Chinoise, which is of French nationality, and Shih Fu Sheng, who is a Chinese citizen holding the position of compradore to the Far Eastern Bank of Harbin at Tientsin.

2. The defendant is an American citizen who by deed dated the 1st day of August, 1927, was appointed assigned of a portion of the assets of the American Overseas Warehouse Company, Incorporated, a company with limited liability registered under the laws of the State of Delaware. The said company is hereafter referred to as the Warehouse Company.

3. As such assignee the defendant assumed charge of the godowns of the Warehouse Company and of such merchandise as was held on storage by the said company as warehousemen.

4. The plaintiffs are severally holders of warrants issued by the Warehouse Company which call collectively for the delivery [1*] of 996,500 bags of flour of various brands. The said warrants have been submitted to the defendant and recognized by him, and such recognition has been confirmed by letter dated the 5th day of April, 1928, which is

*Page-number appearing at the foot of page of original certified Transcript of Record.

attached hereto. There is also attached hereto warrant No. 3671 in favour of the Bank of China which is in the form of the several warrants above mentioned and which was the usual form of warrant issued by the Warehouse Company.

5. On or about the 9th day of July, 1927, the plaintiffs demanded delivery of the said 996,500 bags of flour against the said warrants, but the Warehouse Company refused to make any deliveries and on investigation by Messrs. Borrows and Company, Limited, a firm of surveyors, it was estimated that the godowns of the Warehouse Company contained 91,895 bags of flour which on count was corrected to 91,666 bags only.

6. The said flour being part of the merchandise taken over by the defendant as stated in paragraph 3 hereof was sold, with the consent of the warrant holders, on or about the 16th day of September, 1927. The said flour realized a sum of $300,489.86 which is held by the defendant.

7. On or about the 17th day of January, 1928, the defendant issued a proposal for distribution of the said sum of $300,489.86, a copy of which is attached hereto.

8. The said scheme of distribution includes an allotment in favour of the National City Bank of New York, amounting to $53,137.32.

9. The plaintiffs deny that the National City Bank of New York is entitled to the said sum of $53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum should be distributed amongst such of their number as hold

warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant. [2]

The plaintiffs therefore claim:

1. That the defendant as such assignee is indebted to the plaintiffs severally in sums aggregating $300,489.86, less expenses.

2. That the defendant shall hold the said sum of $300,489.86, less expenses, for the account of the plaintiffs and shall distribute the same proportionately amongst the plaintiffs in accordance with the principle of the defendant's proposal for distribution above referred to copy of which is attached hereto.

3. Costs.

4. Such further and other relief as to this Honorable Court seems meet.

(Sd.) P. H. B. KENT,
Counsel and Attorney for Plaintiff. [3]

EXHIBIT "A."

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

Head Office:

WILMINGTON, DELAWARE, U. S. A.
HSIN CHUNG BUILDING, TIENTSIN.

April 5, 1928.

Ref. No. 2004.

Messrs. Kent and Mounsey,
Tientsin.

Dear Sirs:

I have for acknowledgment your letter of March

28th and I quote therefrom that portion to which you wish a reply.

> "Under Rule 103 of what is known as the Extraterritorial Remedial Code, it is required that all original documents on which claims are based shall be attached to the complaint. In this case the original documents are godown warrants, all of which have been admitted by yourself and therefore should not require to be proved again. We propose in the complaint to state the numbers of the godown warrants and add that they have been admitted by yourself as Assignee."

In your complaint you may state that in my capacity as Assignee for the American Overseas Warehouse Company, I have admitted those godown warrants which have been submitted to me by you on behalf of your clients.

Yours very truly,
(Sd.) R. T. McDONNELL,
Assignee.

RTMcD:ms. [4]

[On reverse side:]
For BANK OF CHINA, TIENTSIN,
(Signed) .....,
Manager.

EXHIBIT "B."

No. 3671.

THE AMERICAN OVERSEAS WAREHOUSE, CO., INC.

27 Seymour Road, Tientsin.

GODOWN WARRANT.

TIENTSIN, June 3, 1927.

Received the undermentioned goods in apparent good condition to be stored for account of BANK OF CHINA Fifteen thousand (15,000) Bags Pyramid Flour.

This warrant covers insurance against Loss on damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of the warrant on the above mentioned goods is M$60,000 but in case of fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

N. B. Not responsible for loss or damage by Earthquake, Typhoons, Storm, Floods, Effect of Climate and/or other Acts of God.

Responsible only for the delivery of the cargo in the condition received taking no cognizance of the contents of the packages.

All transfer of ownership of cargo to be immediately endorsed on this warrant. All charges against goods to be fully paid at the date of transfer.

All charges to be fully paid on delivery of all merchandise.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Signed) .....,

Asst. Manager. [5]

EXHIBIT "C."

AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.

(In Liquidation)

PROPOSED DISTRIBUTION OF PROCEEDS FROM SALE OF FLOUR

The results were arrived at as follows:

From the amount available for distribution, $300,489.86, three per cent or $9,014.70 was deducted as trustee's fee leaving a balance of $291,-475.16.

This amount, $291,475.16 was prorated on the basis of the total proceeds of the sale, $301,561.02, resulting in the following percentages:

Lotus	.30741	per cent =	$ 89,602.38
Green Battleship	.35763	" =	104,240.26
Wheelbarrow	.14423	" =	42,039.46
Green Bamboo	.04961	" =	14,460.08
Egyptian	.04984	" =	14,527.12
Plain	07162	" =	20,875.45
Double Fish	.01024	" =	2,984.71
Queen	00092	" =	268.16

Green Castle	.00303	"	= 883.17
Red Castle	.00182	"	= 530.49
Mixed	.00365	"	= 1,063.88
	1.00000 per cent		$291,475.16

The amount allocated to each brand was then pro rated among the claimants. Plain was regarded as without brand and grouped and apportioned as Shanghai, Canadian and American plain. Double Fish, Queen and Mixed were not specifically claimed and the total amount received from these brands was prorated among all claimants.

BANK OF CHINA

Lotus	$3,050.30
Wheelbarrow	9,342.10
Double Fish, Queen & Mixed	238.68
Total	$12,361.08

BANK OF COMMUNICATIONS

Lotus	$ 15,251.47
Double Fish, Queen & Mixed	74.59
Total	$ 15,326.06

[6]

CHINA & SOUTH SEA BANK

Green Castle	$ 883.17
Egyptian	6,718.79
Lotus	15,251.47
Green Battleship	43,554.42

Wheelbarrow	26,469.29
Shanghai Plain	6,125.13
American Plain	4,375.09
Double Fish, Queen & Mixed	1,704.32
Total	$105,081.68

CHINESE AMERICAN BANK OF COMMERCE

Egyptian	$ 2,179.07
Lotus	15,251.47
Green Battleship	10,162.70
Wheelbarrow	6,228.07
Canadian Plain	5,000.11
Double Fish, Queen & Mixed	691.80
Total	$39,513.22

BANQUE FRANCO-CHINOISE

Egyptian	$ 726.36
Lotus	5,719.30
Green Battleship	17,421.76
Double Fish, Queen & Mixed	242.41
Total	$24,109.83

NATIONAL COMMERCIAL BANK

Red Castle	$ 530.49
Lotus	9,150.88
Green Battleship	11,614.52
Double Fish, Queen & Mixed	231.22
Total	$21,527.11

FAR EASTERN BANK OF HARBIN.

Compradore's Office.

Green Bamboo	$14,460.08
Shanghai Plain	1,000.02
Double Fish, Queen & Mixed	104.42
Total	$15,564.52

EXCHANGE BANK OF CHINA.

American Plain	$1,250.03
Double Fish, Queen & Mixed	55.94
Total	$ 1,305.97

BANK OF AGRICULTURE & COMMERCE.

Egyptian	$2,179.07
Double Fish, Queen & Mixed	223.76
Total	$2,402.83

AGRICULTURAL & INDUSTRIAL BANK OF CHINA.

Egyptian	$726.36
Double Fish, Queen & Mixed	74.59
Total	$800.95

CHUNG YUAN INDUSTRIAL BANK.

Double Fish, Queen & Mixed	$74.59

NATIONAL CITY BANK OF NEW YORK.

Egyptian	$ 1,997.47
Lotus	25,927.49

Green Battleship	21,486.86
Shanghai Plain	3,125.07
Double Fish, Queen & Mixed	600.43
	$53,137.32

SUMMARY.

Bank of China	$ 12,631.08
Bank of Communications	15,326.06
China & South Sea Bank	105,081.68
Chinese American Bank of Commerce	39,513.22
Banque Franco-Chinoise	24,109.83
National Commercial Bank	21,527.11
Far Eastern Bank	15,564.52
Exchange Bank of China	1,305.97
Bank of Agriculture & Commerce	2,402.83
Agricultural & Industrial Bank of China.	800.95
Chung Yuan Bank	74.59
National City Bank of New York	53,137.32
Total	$291,475.16

NOTE: The amount $300,489.86 is drawing interest at the rate of 2% per annum and the total accrued at date of final distribution will be pro rated among all claimants.

R. T. McDONNELL,
Trustee. [7]

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Tientsin,—ss.

The affiant Percy Horace Braund Kent, being first duly sworn, deposes and says that he is counsel

and the duly constituted attorney for the plaintiffs in the above-entitled action, and is personally acquainted with the circumstances of the plaintiffs' claim that he has read and signed the foregoing complaint, and knows the contents thereof and that the facts therein stated are true.

(Sgd.) P. H. B. KENT.

Subscribed and sworn to before me this 20th day of April, 1928.

[Seal] (Sgd.) ————————————,
Vice-Consul of the United States of America at Tientsin.

(Fee Stamp.)

Misc.
Service
No. 908.

[8]

Cause No. 3067—Civil No. 1293. Answer. Filed at Tientsin, China, May 18, 1928. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

ANSWER.

Now comes the defendant above named and for answer unto the plaintiffs' complaint respectfully shows unto this Honorable Court as follows:

1.

The defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the plaintiffs' complaint.

2.

The defendant denies the allegations contained in paragraph 9 of the plaintiffs' complaint, and alleges that the National City Bank of New York is the owner and holder of six certain godown warrants or trust receipts issued to said bank by the said American Overseas Warehouse Company, Inc., which call collectively for the delivery of 161,000 bags of flour of various brands, and therefore said Bank is entitled to participate *pro rata* in the distribution referred to in plaintiffs' complaint. [9]

WHEREFORE defendant prays that the plaintiffs' complaint be dismissed at plaintiffs' cost, and that he be given such other and further relief as to the Court may seem meet and just in the premises.

Dated at Tientsin, China, May 18, 1928.

(Sgd.) R. T. McDONNELL,
Defendant.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Tientsin,—ss.

The affiant, R. T. McDonnell, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

(Sgd.) R. T. McDONNELL.

Subscribed and sworn to before me this 18th day of May, 1928.

(Sgd.) JAMES M. HOWES,
Clerk. [10]

Cause No. 3067—Civil No. 1293. Reply. Filed at Tientsin, China, 22 May, 1928. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

REPLY.

Now come the plaintiffs and respectfully show unto this Honorable Court by way of reply to the answer herein:

1. The plaintiffs deny that the National City Bank of New York is the holder of any godown warrants or documents of the American Overseas Warehouse Company, Incorporated, entitled to rank with the warrants held by the plaintiffs.

2. The plaintiffs admit that the said Bank holds certain documents bearing an endorsement by the said Warehouse Company as follows:

> "We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK."

But the plaintiffs deny that the said goods were

ever received by the said Warehouse Company as alleged in the said endorsement.

3. By way of alternative defense to the defendant's claim on behalf of the National City Bank of New York, the [11] plaintiffs deny that if any of the said goods were received by the said Warehouse Company, they were received under such *con*-conditions as constituted a valid pledge thereof.

4. By way of further alternative defense the plaintiffs deny that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said Company ceased to do business and from which date the assignment by the said Company to the defendant as assignee operated.

(Sgd.) P. H. B. KENT,
Attorney for Plaintiffs. [12]

EXHIBIT No. 1.

(Cause 3067—Exhibit 1.)

Tls.80,111.00/100 Tientsin, April 5, 1927.

On Demand for Value Received, I/We Unconditionally Promise to pay to the Order of the American Overseas Warehouse Company, Inc. at The National City Bank of New York, Tientsin, China, the Principal Sum of Eighty Thousand and 00/100 Tientsin Taels, Together with Interest

Thereon from Date at the Rate of 10 Per Cent Per Annum Until the Said Principal is Paid.

The undersigned has deposited with said Company as collateral security for the payment of this and any and every liability or liabilities of the undersigned to said company direct or contingent, due to or to become due, or which may hereafter be contracted or existing, and whether the same may have been or shall be participated in whole or part to others by trust agreement or otherwise, or in any manner acquired by or accruing to said Company whether by agreement with the undersigned or by assignment or by endorsement to it by any one whomsoever, the following property, viz.:

10,000 bags (net 49 lbs. each) Shanghai Flour @ 3.60 .....$36,000.00

35,000 bags (net 49 lbs. each) Egyptian Flour @ 3.60.....126,000.00

60 bales Gunny Bags 400 bags each @ .60 14,400.00

$176,400.00

together with all other securities in the possession of said Company, belonging to the undersigned or in which the undersigned has an interest, with authority to repledge and or all of the said goods and/or securities hereby agreeing to deliver to said Company additional securities to its satisfaction upon its demand; also hereby giving the said Company a lien for the amount of all said liabilities of the undersigned to said Company upon all property or securities which now are or may hereafter be pledged with said Company by the under-

signed, or in the possession of said Company in which the undersigned has any interest. On the non-performance of said promise or upon the non-payment of any of said liabilities, or upon the failure of the undersigned forthwith to furnish satisfactory additional security on demand at the option of said Company, this obligation shall become immediately due and payable, and said Company is hereby given full power to collect, sell, assign and deliver the whole of said securities or any part thereof or any substitutes therefor, or additions thereto, through any stock exchange, broker's board, or broker or at private sale without advertisement or notice, the same being hereby expressly waived; or said Company at its option may sell the whole or any part of said securities or property at public sale, upon notice published once in any newspaper printed in the Province of Chihli not less than three (3) days prior to such sale, at which public sale said Company may purchase said securities or property or any part thereof free from any right of redemption on the part of the undersigned, which is hereby expressly waived and released. Upon any such sale, after deducting all costs and expenses of every kind, said Company may apply the residue of the proceeds of such sale as it shall deem proper toward the payment of any one or more or all of the liabilities of the undersigned to said Company whether due or not due, returning the overplus to the undersigned and in the event of sale of such security/ies, if the amount realized be insufficient

to pay off this obligation and all interest, costs and charges then accrued, the undersigned agree/s and hereby promises to pay the deficiency then remaining unpaid, on demand of said Company or other holder or owner of this obligation.

The undersigned agrees to pay all expenses of warehousing and preserving the said property and all expenses incurred by the said Company in keeping said property in good condition; to deliver to the Company on the execution of this obligation valid and sufficient fire insurance policies, covering the goods hereby pledged, in the name of the Company, with authority to the Company, if no such policies are delivered to it, to keep the said goods insured and the expense of said insurance to be a lien on the said goods.

The undersigned hereby authorizes any attorney-at-law in the Province of Chihli or elsewhere at any time after the above sum becomes due to appear for the undersigned in any Court in the Province of Chihli or elsewhere, and to waive the issuing and service of process and confess judgment against the undersigned in favor of the payee or any holder of this note for the amount appearing due and the costs of suit and thereupon to release all errors and waive all rights of appeal and stay of execution. The makers of this note, when more than one, shall be jointly and severally liable hereon. The undersigned further agrees to pay all attorneys' and collection fees, costs of court, publication, sale and expenses of every kind

which may be incurred in enforcing payment of this note.

No. 16/1927.

Due 6 weeks—O. K.

THE UNION TRADING CORPORATION, INCORPORATED.

(Signed) .....

General Manager.

We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Sgd.) C. H. CORNISH,

General Manager. [13]

EXHIBIT No. 2.

(Cause 3067—Exhibit 2 (sheet 1).

Tls.30,000.00/100. Tientsin, April 8, 1927.

On Demand for Value Received, I/We Unconditionally Promise to Pay to the Order of the American Overseas Warehouse Company, Inc. at the National City Bank of New York, Tientsin, China, the Principal Sum of Thirty Thousand and 00/100 Tientsin Taels, Together with Interest Thereon from Date at the Rate of 10 Per Cent Per Annum Until the Said Principal is Paid.

The undersigned has deposited with said Company as collateral security for the payment of this

and any and every liability or liabilities of the undersigned to said company direct or contingent, due to or to become due, or which may hereafter be contracted or existing, and whether the same may have been or shall be participated in whole or part to others by trust agreement or otherwise, or in any manner acquired by or accruing to said Company whether by agreement with the undersigned or by assignment or by endorsement to it by any one whomsoever, the following property, viz.:

10,000 bags (net 49 lbs. each) Green Battleship Brand Flour @ 3.40.....$34,000.00

10,000 bags (net 49 lbs. each) Red Battleship Brand Flour @ 3.40..... 34,000.00

$68,000.00

together with all other securities in the possession of said Company, belonging to the undersigned or in which the undersigned has an interest, with authority to repledge and or all of the said goods and/or securities hereby agreeing to deliver to said Company additional securities to its satisfaction upon its demand; also hereby giving the said Company a lien for the amount of all said liabilities of the undersigned to said Company upon all property or securities which now are or may hereafter be pledged with said Company by the undersigned, or in the possession of said Company in which the undersigned has any interest On the non-performance of said promise or upon the non-payment of any of said liabilities, or upon the failure of the undersigned forthwith to furnish satisfactory addi-

tional security on demand at the option of said Company, this obligation shall become immediately due and payable, and said Company is hereby given full power to collect, sell, assign and deliver the whole of said securities or any part thereof or any substitutes therefor, or additions thereto, through any stock exchange, broker's board, or broker or at private sale without advertisement or notice, the same being hereby expressly waived; or said Company at its option may sell the whole or any part of said securities or property at public sale, upon notice published once in any newspaper printed in the Province of Chihli not less than three (3) days prior to such sale, at which public sale said Company may purchase said securities or property or any part thereof free from any right of redemption on the part of the undersigned, which is hereby expressly waived and released. Upon any such sale, after deducting all costs and expenses of every kind, said Company may apply the residue of the proceeds of such sale as it shall deem proper toward the payment of any one or more or all of the liabilities of the undersigned to said Company whether due or not due, returning the overplus to the undersigned and in the event of sale of such security/ies, if the amount realized be insufficient to pay off this obligation and all interest, costs and charges then accrued, the undersigned agree/s and hereby promises to pay the deficiency then remaining unpaid, on demand of said Company or other holder or owner of this obligation.

The undersigned agrees to pay all expenses of

warehousing and preserving the said property and all expenses incurred by the said Company in keeping said property in good condition; to deliver to the Company on the execution of this obligation valid and sufficient fire insurance policies, covering the goods hereby pledged, in the name of the Company, with authority to the Company, if no such policies are delivered to it, to keep the said goods insured and the expense of said insurance to be a lien on the said goods.

The undersigned hereby authorizes any attorney-at-law in the Province of Chihli or elsewhere at any time after the above sum becomes due to appear for the undersigned in any Court in the Province of Chihli or elsewhere, and to waive the issuing and service of process and confess judgment against the undersigned in favor of the payee or any holder of this note for the amount appearing due and the costs of suit and thereupon to release all errors and waive all rights of appeal and stay of execution. The makers of this note, when more that one, shall be jointly and severally liable hereon. The undersigned further agrees to pay all attorneys' and collection fees, costs of court, publication, sale and expenses of every kind which may be incurred in enforcing payment of this note.

No. 17/1927.

Due 6 weeks—O. K.

THE UNION TRADING CORPORATION, INCORPORATED.

(Sgd.).....,

General Manager. [14]

We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.

THE AMERICAN OVERSEAS WAREHOUSE CO. INC.

(Sgd.)WILLIAM P. HUNT,
Acting Manager.

(Copy)

(Exh. 2, sheet 2.)

No. 3621

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

27 Seymour Road, Tientsin.

GODOWN WARRANT.

Tientsin, April 8, 1927.

Received the under mentioned goods in apparent good condition to be stored for account of National City Bank of New York.

Ten Thousand (10,000) Bags Green Battleship Brand Flour.

Ten Thousand (10,000) Bags Red Battleship Brand Flour.

This warrant covers insurance against Loss on damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of this warrant on the above mentioned goods is M$68,000.00/100 but in case of

fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

N. B. Not responsible for loss or damage by Earthquake, Typhoons, Storms, Floods, Effects of Climate and/or other Acts of God.

Responsible only for the delivery of the cargo in the condition received taking no cognizance of the contents of the packages.

All transfer of ownership of cargo to be immediately endorsed on this warrant. All charges against goods to be fully paid at the date of transfer.

All charges to be fully paid on delivery of all merchandise.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Seal) (Sgd.) WILLIAM P. HUNT,
Acting Manager. [15]

EXHIBIT No. 3.

American Overseas Warehouse Co.

(Cause 3067—Exhibit 3.)

THE NATIONAL CITY BANK OF NEW YORK.

IN CONSIDERATION OF THE NATIONAL CITY BANK OF NEW YORK (hereinafter referred to as the said Corporation) allowing me/us the undersigned to overdraw my/our account with the said Corporation or to open an overdrawn account with the said Corporation, I/we hereby pledge to the said Corporation as security for the repayment to the said Corporation on demand of all amounts due or which hereafter may become

due from me/us to the said Corporation, as well as for all interest on such overdrawn account at the rate or rates charged by the Corporation and all costs and charges, all Stocks, Shares and Securities which I/we may have already deposited with the said Corporation, or which may be in their possession as also all Stocks, Shares and Securities which I/we may hereafter deposit with the said Corporation or which may hereafter come into their possession. AND I/we the undersigned hereby constitute and appoint as my/our Attorney for the purposes hereinafter mentioned the Manager or Agent for the time being in Tientsin of the said Corporation and specially authorize and empower him to fill up and complete any incomplete transfer attached to any of such Stocks, Shares and Securities, and to insert his name or that of any other nominee of the said Corporation therein as transferee of the Shares and Securities enumerated therein, and to sign, or as the case may be, to sign, seal, execute and deliver any such transfer or other document that may be necessary or required for the purpose of completing the title of the said Corporation to any of such Stocks, Shares, and Securities, and register the same in the books of the Corporation to which the same relates, and obtain fresh scrip for the Shares and Securities enumerated therein in his own name or in that of any other employee of the said Corporation without any reference to or consent of me/us. Also to sell and absolutely dispose of all or any such Stocks, Shares and Securities in such manner as he may

think fit without any reference to or consent of me/us. AND I/we hereby agree at the request of such Manager or Agent of the said Corporation to sign, or, as the case may be, to sign, seal, execute and deliver any transfer or other document that may be necessary or required by the said Corporation for the purpose of completing the title of the said Corporation to any of such Stocks, Shares and Securities. AND I/we further authorize the said Corporation to reimburse themselves out of the proceeds of any sale all costs, charges, and expenses incurred by them in transferring and selling all or any of such Stocks, Shares and Securities. AND I/we declare that the said Corporation shall not be responsible for any loss from or through any brokers or others employed in the sale of any of such Stocks, Shares and Securities, or for any loss or depreciation in value of any of such Stocks, Shares and Securities arising from or through any cause whatsoever. AND any deficiency whatsoever and however arising, I/we agree to make good and pay on demand to the said Corporation. AND it is further agreed that the said Corporation shall have a lien on all such Stocks. Shares and Securities or on the proceeds after sale thereof (if sold) as security for or in part payment of any other debt due or liability then incurred or likely to be incurred by me/us to the said Corporation. AND I/we further authorize the said Corporation to collect all dividends and bonuses payable or hereafter paid in respect of any of such Stocks, Shares and Securities, and engage to sign all such further

documents as may be necessary effectually to vest in the said Corporation the property in the said Stocks, Shares and Securities, and the dividends and bonuses payable in respect thereof [16] or to effect the selling or transferring of the same. AND I/we further agree at all times to keep up the value of such Stocks, Shares and Securities. And in the event of a temporary or permanent depreciation in value of any of such Stocks, Shares and Securities at the request of the said Corporation or the Manager or Agent for the time being either to pay to the said Corporation in money the difference between the market value of any of such Stocks, Shares and Securities, on the date when they were deposited with or came into the possession of the said Corporation and on the date when such payment as aforesaid may be made, or to deposit with the said Corporation other approved Stocks, Shares and Securities, equivalent in value to the market deterioration. AND in the event of my/our failing to comply with such request I/we hereby authorize the said Corporation or the Manager or Agent for the time being to immediately exercise all or any of the powers hereby conferred upon them and him. AND I/we lastly declare that the said Corporation or the Manager or Agent for the time being shall not be answerable or responsible for any damage or depreciation which any of such Stocks, Shares and Securities may suffer whilst in their possession under this Agreement.

IN WITNESS WHEREOF I/we have hereunto set my/our hand and seal this 2d day of September, one thousand nine hundred and twenty-six.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Sgd.) C. H. CORNISH, (Seal)
General Manager.

Signed, sealed and delivered by ....., in the presence of .....,

(Signed) ..... [17]

In the United States Court for China.

Cause No. 3067—Civil No. 1293. Decision and Judgment. Filed at Shanghai, China, July 16, 1928. James M. Howes, Clerk.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LTD., BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,

Plaintiffs,

vs.

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE,

Defendant.

DECISION AND JUDGMENT.

The plaintiffs in this case are banking institutions of Chinese nationality, with the exception of the Banque Franco-Chinoise, which is of French nationality, and Shih Fu Sheng, who is a Chinese citizen holding the position of compradore to the Far Eastern Bank of Harbin at Tientsin, China. The defendant is an American citizen who by deed, dated the 1st day of August, 1927, was appointed assignee of a portion of the assets of the American Overseas Warehouse Company, Inc., a company with limited liability registered under the laws of the State of Delaware. As such assignee, the defendant assumed charge of the godowns of the Warehouse Company, and of such merchandise as was held in storage by said company as a warehouseman. The plaintiffs are severally holders of godown warrants, or warehouse receipts, issued by the Warehouse Company, which collectively call for the delivery of 996,500 bags of flour of various brands. Said warrants, or godown receipts, have been submitted to the defendant and recognized by him as having been duly issued to the holders thereof by the American Overseas Warehouse Company. Warrant No. 3671, in favor of the Bank of China, is attached to and made a part of the complaint for the purpose of showing the form of the several warrants held with the plaintiffs herein, and as the usual [18] form of warrant issued by the warehouse company. On or about the 9th day

of July, 1927, and before the appointment of the assignee herein, the plaintiffs demanded delivery of said 996,500 bags of flour upon presentation of their said warrants, but the warehouse company refused to make any deliveries thereof, and upon an investigation by Messrs. Barrows & Co., Ltd., a firm of surveyors, it was estimated that the godowns or warehouses of the warehouse company contained but 91,895 bags of flour, which on a recount was corrected to 91,666 bags only. These 91,666 bags of flour were subsequently taken possession of by the defendant upon his appointment as assignee on the 1st of August, 1927, and was sold by him on or about the 16th day of September, 1927, by and with the consent of all the warrant holders. From the sale of said flour there was realized the sum of Mex. $300,489.86, which sum was thereafter, and up and until the trial of this case, held by the defendant as such assignee. Thereafter, to wit, on or about the 17th day of January, 1928, the defendant as assignee issued a proposal in writing for the distribution, among the various claimants of said flour, of the said sum of $300,489.86, a copy of which said proposal is attached to the complaint and made a part thereof. It appears from such proposal, that the plan or scheme of distribution of said monies in the hands of the assignee contemplated and provided for an allotment to and in favor of the National City Bank of New York, amounting to the sum of $53,137.32.

It is the contention of the plaintiffs that the National City Bank of New York is not entitled to an

allotment of said sum of $53,137.32, or to any other sum with respect to said flour, and that the entire amount realized by the assignee from the sale of said flour, less the expenses of the assignee, in the amount of $10,000.00, should be distributed among the plaintiffs herein according to their holding of warehouse receipts calling for flour of the brands in question, and that subject to such re-adjustment, plaintiffs are willing to accept the said proposal of the defendant. This action was accordingly instituted by the plaintiffs against the defendant assignee, praying [19] that he be adjudged indebted to the plaintiffs severally in sums aggregating Mex. $300,489.86, less expenses, and that the defendant be adjudged as holding said sum of $300,489.86, less expenses, for the account of the plaintiffs, and that defendant be required and ordered to distribute the same proportionally among the plaintiffs in accordance with the principle of defendant's proposal for distribution herebefore referred to. The plaintiffs further asked for costs and for such further and other relief as to this Court may seem meet and proper.

The answer of the assignee admits all of the allegations contained in paragraphs one to eight inclusive of plaintiffs' complaint, but denies the allegations contained in paragraph nine of the complaint. The answer then alleges that the National City Bank of New York is the owner and holder of six certain godown warrants, or warehouse receipts, issued to said bank by the said American Overseas Warehouse Company, Inc., which collectively call

for the delivery of 161,000 bags of flour of various brands, and that said bank is therefore entitled to participate *pro rata* in the distribution referred to in the complaint and in accordance with the scheme of distribution proposed by the assignee of the funds in his hands as proceeds from the sale of 91,-666 bags of flour. The plaintiffs in their reply deny that the National City Bank of New York is the holder of any godown warrants or documents of the American Overseas Warehouse Company entitled to rank with the warrants held by the plaintiffs, but admit that the National City Bank is the holder of certain documents bearing an endorsement of said Overseas Warehouse Company as follows: "We have received the goods mentioned in this instrument, and will hold the same to the order of the National City Bank of New York, and we hereby transfer all our rights under this instrument to the National City Bank of New York." Plaintiffs further deny that the goods referred to in said endorsement were ever received by the American Overseas Warehouse Company as therein alleged. [20]

There is practically no dispute between the parties with respect to the facts in this case. It appears that the American Overseas Warehouse Company is a corporation organized under the laws of the State of Delaware, and for some time prior to the appointment of the assignee herein, was engaged in carrying on and conducting, among other things, a warehouse business in the city of Tientsin, China; that in its business dealings and transactions

said warehouse company was closely affiliated with a company known as the Union Trading Company, which last named company was engaged in conducting in said city of Tientsin the business of an exporter and importer on a rather extensive scale. It further appears that early in the month of July, 1927, the American Overseas Warehouse Company had outstanding godown warrants, or warehouse receipts, calling for the delivery of more than a million bags of flour of various brands. When, therefore, the plaintiffs in this action presented their godown warrants and demanded delivery of the flour supposed to be stored with the warehouse company, it was immediately ascertained that there had been a colossal failure, and that frauds of an astounding nature had been perpetrated upon those persons who had been doing a storage business with the warehouse company. It was ascertained that the warehouse company had in its godowns, or warehouses, only about 91,666 bags of flour of various brands, whereas it should have had, if its officers and agents had been conducting a legitimate and proper business, approximately 1,156,000 bags of flour. When, therefore, the assignee on the 1st day of August, 1927, took possession of the godowns and property of the warehouse company, he was confronted with the problem of returning to claimants all personal property which belonged to them, and to which the American Overseas Warehouse Company did not have title. The assignee found in the warehouses of the company only 91,666 bags of flour. These plaintiffs immediately presented

to him warehouse receipts, or godown warrants, calling for the delivery of 996,000 bags [21] of flour of various brands, and the National City Bank of New York presented to him six certain documents which the assignee has construed as standing upon the same footing as warehouse receipts, and under which the bank claimed that it was entitled to receive 161,000 bags of flour of various brands. By the consent of all parties concerned the 91,666 bags of flour were sold by the assignee for Mex. $300,486.86, and he thereupon in the month of January, 1928, devised the plan referred to in the complaint for the distribution of such proceeds, less his expenses, to the various claimants holding godown receipts, which plan included the National City Bank of New York as one of the claimants. The only question presented in this case is whether the National City Bank of New York is entitled to participate in its proportionate share to these moneys in accordance with the plan proposed by the assignee.

(1) If the various instruments in writing held by the National City Bank, and under which it asserts title to 161,000 bags of flour in the godown of the Overseas Warehouse Company, were of the same character, or the legal equivalent, of the warehouse receipts held by the plaintiffs herein, there would manifestly be no controversy as to the right of the bank to participate along with these plaintiffs in the disposition and distribution of these funds by the assignee. It is the contention of counsel for the assignee in behalf of the bank, that while

these six instruments held by the bank, evidencing title to 161,000 bags of flour, are different in form from the warehouse receipts held by the plaintiff, that in legal effect they are the equivalent to warehouse receipts and must be construed as such by the Court in determining the right of the bank to participate in the distribution of the funds. It therefore becomes necessary to examine somewhat closely and critically the precise nature of the transaction by which the bank became invested with title to certain bags of flour supposed to have been deposited in the godowns of the [22] Overseas Warehouse Company. One transaction will serve to illustrate five of the transactions involving 141,000 bags of flour to which the bank claims title. The sixth transaction, being the one of April 8, 1927 (Defendant's Ex. 2), will be considered separately.

It appears from Defendant's Ex. 1 that on the 5th day of April, 1927, the Union Trading Corporation executed and delivered to the American Overseas Warehouse Company, Inc., its promissory note for Tientsin Tls.80,000.00 for value received, with interest at the rate of 10% per annum payable on demand at the National City Bank of New York at Tientsin, China. It further appears that simultaneously with the execution and delivery of said promissory note, that the Union Trading Corporation deposited with the Overseas Warehouse Company, as collateral security for the payment of said note, the following described personal property:

10,000 bags (net 49 lbs. each) Shanghai Flour @ $3.60.....$ 36,000
35,000 bags (net 49 lbs. each) Egyptial Flour @ 3.60.....$126,000
60 bales Gunny Bags 100 bags each @ .60..$ 14,400

Total.....$176,400

On the back of this promissory note, Ex. 1 appears the following endorsement by the General Manager of the Overseas Warehouse Company:

"We have received the goods mentioned in this instrument and will hold same to the order of the National City Bank of New York and we hereby transfer all our rights under this instrument to the National City Bank of New York.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Signed) C. H. CORNISH,
General Manager."

The foregoing is the transaction under which the National City Bank of New York claims to be the owner, or entitled to the possession as pledgee, of 45,000 bags of flour of the brands above described, alleged to have been delivered by the Union Trading Corporation to the Overseas Warehouse Company on the 8th day of April, 1927, as collateral security for the payment of said promissory note. Our inquiry now is as to whether such transaction operated as a matter of [23] law to give to the National City Bank the "status" of a holder of a warehouse receipt from the Overseas Warehouse Company, so as to enable the bank to participate in

the proposed allocation of the funds now in the hands of the assignee.

It is elementary law that every contract by which the possession of personal property is transferred as security only is to be deemed a pledge.

Irwin vs. McDowell, 34 Pac. 708.
Waldie vs. Dol, 29 Cal. 555.
Belden vs. Perkins, 78 Ill. 449.
Neguiar vs. Thomas, 42 S. W. 846.
Beacon Trust Co. vs. Robbins, 173 Mass. 261; 53 N. E. 868.
Barber v. Hathaway, 169 N. Y. 575, 61 N. E. 1127.
Hinsdale vs. Jerman, 115 N. C. 152,
Providence Thread Co. vs. Aldrich, 12 R. I. 77.
Hudson vs. Wilkinson, 45 Tex. 444.
Taggart vs. Packard, 39 Vt. 628.
Parkesburg 1st Nat. Bank vs. Harkness, 42 W. Va. 156; 24 S. E. 548.
Herrman vs. Central Car Trust Co., 101 Fed. 41; 41 C. C. A. 176.

Conceding that these 45,000 bags of flour were deposited by the Union Trading Corporation with the Overseas Warehouse Company on the 5th day of April, 1927, as collateral security for the payment of the note, it is clear beyond all controversy that these identical bags of flour must have been received by the warehouse company as a pledge, to be held by it as security for the payment of the note.

When, therefore, the warehouse company assigned the note and transferred all its rights thereto to the National City Bank, the National City Bank merely stepped into the shoes of the warehouse company. The only difference being that the bank did not have manual possession of the 45,000 bags of flour which had been pledged by the Union Trading Company to secure the payment of the note, but the bank did have *construction* possession and effective control of this pledged property under and by virtue of the undertaking of the warehouse company to hold the same to the order of the National City Bank. In other words, at the time of the failure of the Overseas Warehouse Company, and when the assignee took possession of all of its property on the 1st of August, 1927, the National City Bank was the owner [24] of a promissory note for Tls.80,-000.00, which was made and executed by the Union Trading Company on the 8th day of April, 1927. The bank was likewise entitled to take possession at any time of the 10,000 bags of Shanghai flour and the 35,000 bags of Egyptian flour which the Overseas Warehouse Company had received as a pledge and collateral security for the payment of a note, and which after the assignment of the note to the bank, the Overseas Warehouse Company was supposed to be holding as bailee to the order of the bank.

Now it seems to me very clear that in such a situation the bank was not entitled to receive from the Warehouse Company any other property, or any other bags of flour than those which the Warehouse Company had received as a pledge, and which it had

agreed to hold to the order of the bank. Certainly neither the bank nor the Overseas Warehouse Company had the right to appropriate the flour, or any part thereof, that had been stored with the Warehouse Company by the holders of these warehouse receipts in order to make good any misappropriation or loss of such pledged property. The determination of the rights of these parties under their respective muniments of title, comes down, in my opinion, largely to a matter of proof. If the bank were able to show, by a preponderance of the evidence, that these 45,000 bags of flour, of Shanghai and Egyptian brands, and which had been received by the Warehouse Company as a pledge, were still in the warehouse or godown of the company, having been specially set aside and ear-marked as the property of the Union Trading Company, then I take it that the bank would be entitled to the possession of such property, even though there was not another bag of flour in the godown or warehouse which could be appropriated for the benefit of these plaintiffs as holders of godown warrants. But the difficulty, with respect to the claim of the bank, is that no flour was found upon the premises specially ear-marked or set aside as the [25] property of the bank, or as the property of the Union Trading Company, and it may very well have been, in view of the misappropriation by the Warehouse Company of more than a million bags of flour, that the "pledged flour," in which only the bank had an interest, was entirely misappropriated by someone connected

with the Warehouse Company. However that may be, as I view the case it was necessary for the bank to prove by competent evidence that the flour which it claimed as a pledge and as security for the payment of its note, was in the possession of the assignee at the time he took over the 91,666 bags of flour of various brands on the 1st of August, 1927.

Counsel for both parties have filed elaborate and interesting briefs for the benefit of the court, and many questions of law have been exhaustively discussed, all of which have some bearing upon the question here under consideration. I have not deemed it necessary to go into those questions in this opinion, for the simple reason that in their last analysis they all come down to the question as to whether the National City Bank is the holder of evidences of title to this flour which are in legal effect the equivalent of warehouse receipts. I have no difficulty in reaching the conclusion that five of the transactions, all of which are similar to the one illustrated by Ex. 1, do not as a matter of law place the bank in the position of a holder of warehouse receipts.

(2) Defendant's Ex. 2 is a promissory note for Tls.30,000.00, dated April 8, 1927, signed by the Union Trading Corporation, and made payable to the order of the American Overseas Warehouse Company. It is in all respects identical with Plaintiff's Ex. 1, except as to the amount and character of the collateral security deposited with the Warehouse Company to secure the payment of the

note. In this instance 10,000 bags of Green Battleship (brand) flour of the value of $34,000.00 and 10,000 bags of Red Battleship [26] (brand) flour of the value of $34,000.00 is the quantity and description of the property pledged. This note, together with all the rights of the Overseas Warehouse Company thereto, was assigned and transferred on the 8th day of April, 1927, to the National City Bank, and the Warehouse Company in its endorsement on the note acknowledged that the bags of flour therein described had been received by it in good condition, and that the Warehouse Company would hold the same to the order of the National City Bank of New York. It further appears, however, that thereafter, and on the same day, the National City Bank of New York obtained from the American Overseas Warehouse Company a godown warrant for these identical 20,000 bags of flour in the precise form of the godown warrants held by the plaintiffs herein. In such godown warrant, which is in evidence as Godown Warrant No. 3621, there is contained among other things the following recitals:

"Received the undermentioned goods in apparent good condition to be stored for account of National City Bank of New York.

Ten Thousand (10,000) Bags Green Battleship Brand Flour,

Ten Thousand (10,000) Bags Red Battleship Brand Flour.

This warrant covers insurance against Loss on

damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of this warrant on the above mentioned goods is M$68,000.00, but in case of fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Signed) WILLIAM P. HUNT,
Acting Manager."

It is the contention of counsel for the plaintiffs that the bank is not entitled to participate in the funds now in the hands of the assignee under this godown warrant for these 20,000 bags of flour, for the following reasons:

A. It is asserted that this godown warrant, No. 3621, was issued to secure the private indebtedness of the Warehouse Company, and therefore cannot be regarded as valid. (Plaintiff's Brief—page 15.)

B. It is further contended that this godown warrant, No. 3621, merely accompanied and supported the document of pledge from the Union Trading Corporation to the Warehouse Company, the benefit of which had been endorsed [27] over to the National City Bank of New York, and it is asserted that the accompanying godown warrant was accepted by the National City Bank with full notice of the capacity in which the Warehouse Company assigned its interests, and that therefore this godown warrant in the hands of the National City

> Bank of New York can have no greater value than the legal relationship between the several parties attached to the main documents warranted. (Plaintiff's Brief—page 15.)

I am not at all impressed by this argument and reasoning, and I must confess that I have been unable to see the logic or force of such contentions. I can see no good reason for denying to the National City Bank the right to deposit these 20,000 bags of flour with the Overseas Warehouse Company and take from said Company a godown receipt for the same which I conceive to be the legal effect of the transaction. It is true that the Union Trading Corporation deposited with the Overseas Warehouse Company these 20,000 bags of flour as a pledge to secure the payment of its promissory note of Tls.30,000.00. But the 20,000 bags of flour so deposited as a pledge with the Warehouse Company were subsequently transferred and turned over to the National City Bank when the Bank took an assignment from the Warehouse Company, for a valuable consideration of the promissory note, for Tls.30,000.00, which had been issued by the Union Trading Corporation. It is quite clear to my mind that after such assignment of the note to the Bank together with the pledged property, the Overseas Warehouse Company was eliminated from the picture except that it still remained as bailee of the Bank. The National City Bank thereupon held the note of the Union Trading Corporation, and at the same time had received all the interest in the pledged property consisting of 20,000 bags of flour,

which the Warehouse Company had acquired from the Union Trading Corporation. It is true that the Bank left this pledged property, which was to be held by the Warehouse Company to the Bank's order, in the actual possession of the Warehouse Company. In such a situation, it seems to me that the National City Bank had such a present interest [28] in this pledged flour of 20,000 bags as to entitle the Bank to deposit the same with the Warehouse Company for storage, and to take a godown receipt therefor, instead of leaving it in the possession of the Warehouse Company as pledged property to be delivered to the Bank upon its order. I therefore conclude that the taking of this godown receipt by the Bank from the Overseas Warehouse Company for these 20,000 bags of flour, operated to place the Bank, so far as this particular property was concerned, in the "status" of a *bona fide* holder of a warehouse receipt. Whether the Bank violated its contract with the Union Trading Company, the pledgor, in so doing, is in my judgment quite beside the question. The fact remained that the National City Bank had control and was at all times after the assignment to it of the note, entitled to the possession of these 20,000 bags of flour, and if it elected to place those 20,000 bags of flour in storage with the Overseas Warehouse Company under a warehouse receipt, and did so as a matter of fact, the Bank is now entitled to make claim under its godown warrant.

(3) There is one other matter which in my judgment deserves some special consideration in con-

nection with this claim of the Bank under its godown warrant No. 3621. It will be observed that this godown warrant calls for the delivery of 10,000 bags of "Green Battleship" flour, and 10,000 bags of "Red Battleship" flour. An inspection of the assignee's proposed scheme of distribution fails to disclose that he took possession of any flour of the brand described as "Red Battleship." If there were no bags of flour of the brand described as "Red Battleship" in the godown at the time the assignee took over the property, it would seem that neither the Bank nor any of the plaintiffs holding godown warrants for "Red Battleship" flour would be entitled to participate under their "Red Battleship" receipts as tenants in common in the proceeds in the hands of the assignee derived from [29] the sale of other and different brands of flour. The rule of law to be applied in such cases is clearly and forcibly stated by the Circuit Court of Appeals of the Sixth Circuit in the case of Interstate Banking & Trust Co. vs. Brown, 235 Fed. 32, 39, as follows:

> "We do not find that this section has been construed by other decisions in a way here helpful, and we must, without such aid, determine its force as applied to the present case. It seems a proper summary of text-book definitions, as modified by this section, to say that fungible goods are those of which each unit is fully equivalent to each other unit; that this equivalency may be inherent or may result

from agreement; and that such agreement may be express or may be implied from custom. Further, it seems obvious that goods may be of one of three classes: Inherently fungible, or capable of acquiring that quality by agreement, or quite incapable thereof. Bushels of wheat of the same grade are necessarily the equivalent of each other; barrels of flour may or may not have that mutual relationship—presumptively, they do not (Jones on Collateral Securities, sections 317, 318)—though the interested parties may intelligibly consent that flour shall be so considered; but that there should be any express agreement or any contract-raising custom whereby a bolt of cloth and a case of boots and shoes should be treated as equivalent to each other is beyond comprehension. We take it, the statute, section 23, must mean only that the right of the warehouseman to mix articles so as to lose their identity and his right to deliver on a receipt, not the thing which he received but other equivalents, are to be confined to the first two classes of articles above mentioned, viz., those inherently equivalent to each other, and those which may be so, and which, therefore, can rightfully be thought of as subject to an agreement or a custom to that effect, but that these rights do not extend to articles where mutual equivalency is inherently impossible. To use the foregoing illustration we cannot comprehend an agreement or custom which would authorize a warehouseman to deliver

boots and shoes in satisfaction of his receipt for cloth."

It may be that a number of bags of "Red Battleship" flour were taken over by the assignee and listed by him under the denomination of "Plain," "Mixed," or "Red Castle" brands, in which event the proposed plan and distribution would seem to be in accordance with the law. I merely put forth the suggestion that only bags of flour of the same size and brand (the quality being presumably the same) can be regarded as fungible property, and that only warrant holders of flour of the same brand are entitled to [30] participate as tenants in common in the proceeds from the sale of the flour of that particular brand. I note also that the godown warrant which is attached to the complaint as Plaintiff's Ex. "B," and dated June 3, 1927, calls for the delivery from the godown company to the Bank of China of 15,000 bags of "Pyramid Flour." It will be observed that the assignee's proposed plan for distribution makes no mention of a brand of "Pyramid Flour," and unless "Pyramid Flour," as described in the godown warrant Ex. "B," is the same and identical with Egyptian Flour, which the assignee lists as a brand of flour which he took over, the Bank of China would not be entitled to participate in the proceeds from the sale of Egyptian Flour under a warrant showing that it had stored

a flour of entirely different brand, to wit, Pyramid Flour. These observations are, in my opinion, not only pertinent, but should be observed in ascertaining what amount each holder of godown warrants for flour should be entitled to receive and participate in, with respect to the proceeds from each particular brand of flour which may have been taken over and sold by the assignee.

It may be that the principles of law hereinbefore referred to as governing the rights of parties to participate in the allotment and distribution of fungible goods cannot be applied by the assignee in this case with complete accuracy, for the reason that he is attempting to distribute a particular fund instead of the property itself. It will be remembered that the flour was sold by the assignee with the consent of all the parties claiming an interest therein. If the flour had been sold by the assignee in lots of the various brands found in the warehouse and a separate account of such sales and of the proceeds therefrom kept by him, allotments to the various claimants might have been made in accordance with the principles enunciated in "Interstate Banking & Trust Co. vs. Brown," *supra.* But it may be that the assignee sold the flour in a lump sum or in lots made up of various brands of flour and of various amounts, in which case it [31] would be difficult, if not impossible, to make allotments to the various claimants of the monies so received in accordance with the principles of law hereinbefore discussed.

Such difficulties would, however, not affect a case in which a claimant held a godown receipt for a particular brand of flour, which was not found by the assignee to be in the godown when he took it over, and which did not contribute to the fund in which the holder of the godown warrant was seeking to participate. A simple illustration will, I think, make this clear.

Let us suppose that the National City Bank of New York held a godown warrant of the Overseas Warehouse Company calling for the delivery of 95,000 bags of flour of the brand of "Pillsbury's Best." If no flour of such brand was in the godown of the warehouse company when the assignee in this case took over 91,666 bags of flour of the various brands mentioned, and thereafter sold same, I take it as being too clear for argument that the National City Bank, under its godown warrant calling for 95,000 bags of "Pillsbury's Best," would not be entitled to participate in the proceeds derived from the sale of such other brands of flour, or in any part thereof. On the other hand, if the assignee had found 91,666 bags of flour of the brand of "Pillsbury's Best," for which the National City Bank held a godown warrant calling for the delivery of 95,000 bags of flour of the brand of "Pillsbury's Best," then and in such case it would be equally clear that these plaintiffs would not be entitled to participate in any part of the proceeds derived from the sale of the flour of the "Pillsbury" brand, but the entire proceeds therefrom would go to the Bank.

The assignee has allowed the National City Bank of New York, in his proposed scheme of distribution, the sum of Mex. $53,137.32, as and for its proportionate share of the funds under the Bank's claim to 161,000 bags of flour of various brands. I have heretofore held, in the first part of this opinion, that such claim on the part of the [32] Bank must be rejected to the extent of 141,000 bags of flour, on the ground that its documents of alleged title thereto were not the legal equivalent of godown receipts, but in the latter part of this opinion I have held that the Bank's claim for the return of 20,000 bags of flour under its godown receipt No. 3621 is valid if the 10,000 bags of "Red Battleship" flour were received by the assignee, and that the Bank is entitled to participate in the distribution and allocation of these funds to that extent. It follows from these findings and conclusions of law heretofore expressed, that the National City Bank is only entitled to have and receive from the assignee 20/161 of Mex. $53,137.32, or the sum of $6,600.90, and that the balance of the $53,137.32, less said sum of $6,600.90, should be readjusted and allocated among the various plaintiffs herein as their interests may appear. In the event that the assignee did not receive any flour of the "Red Battleship" brand, then the Bank's allotment should be reduced from $6,600.90 to $3,300.45.

It is accordingly ordered, adjudged and decreed that the defendant revise and readjust his proposal

for the distribution of the proceeds in his hands from the sale of the flour, in accordance with this opinion, allotting to the National City Bank of New York $6,600.90, or $3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee, and increasing the allotments to the plaintiffs herein, as their interests may appear, and thereupon defendant is ordered to pay and distribute the same when so reallotted, to the several plaintiffs and to the National City Bank upon receiving their receipts therefor. Costs will not be awarded to either party.

MILTON D. PURDY,
Judge.

Dated this 16th day of July, 1928. [33]

Cause No. 3067—Civil No. 1293. Motion for a New Trial. Filed at Shanghai, China, July 24, 1928. (Sgd.) L. T. Kenake, Asst. Clerk.

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL.

Now comes the defendant in the above-entitled action and through his undersigned attorneys respectfully moves this Court for a new trial herein for the following reasons and on the following grounds:

1. That the Court erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and the Na-

tional City Bank of New York was that of pledgor and pledgee.

2. That the Court erred in holding and deciding that the National City Bank of New York, having left with the American Overseas Warehouse Company as bailee certain fungible merchandise, was entitled to receive that particular merchandise only and that after a commingling of such particular merchandise with other merchandise of a like kind, the said National City Bank of New York could not participate *pro rata* in the commingled property. [34]

3. That the Court erred in holding and deciding that the National City Bank of New York could not successfully claim any merchandise of a fungible nature left by it with the American Overseas Warehouse Company as bailee, without proving by competent evidence that the actual merchandise so left with the said American Overseas Warehouse Company was in the possession of the assignee of that company at the time he took over as such assignee.

4. That the Court erred in holding and deciding that all of the transactions between the American Overseas Warehouse Company and the National City Bank of New York similar to the one illustrated by Exhibit 1, do not as a matter of law place the National City Bank of New York in the position of a holder of a warehouse receipt.

5. That the decision and judgment of the Court is contrary to law.

Dated: Shanghai, China, July 24, 1928.

FLEMING, FRANKLIN & ALLMAN.
By C. S. FRANKLIN,
Attorneys for Defendant.

To the Clerk U. S. Court for China and to Messrs. Kent & Mounsey, Attorneys for the Plaintiffs.

You will please take notice that the foregoing motion will be presented to the Honorable Milton D. Purdy, Judge of the above-entitled court, at ten o'clock A. M., on Monday, August 27, 1928, or as soon thereafter as counsel may be heard.

FLEMING, FRANKLIN & ALLMAN.
By C. S. FRANKLIN,
Attorneys for Defendant. [35]

Cause No. 3067—Civil No. 1293. Bill of Exceptions. Filed at Shanghai, China, September 8, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 25th day of May, 1928, the above-entitled cause came on for hearing at Tientsin, China, before the Honorable Milton D. Purdy, Judge of the United States Court for China; the plaintiffs appearing by P. H. B. Kent, Esq., of Messrs. Kent & Mounsey, and Mr. H. Bonnafous, their attorneys, and the defendant appearing by Cornell S. Franklin, Esq., of Messrs.

Fleming, Franklin & Allman, his attorneys, and the following proceedings took place:

. . . . . .

Judge Franklin offers Exhibit 1 and and it is agreed by Mr. Kent that it is one of the six godown warrants upon which the National City Bank claims and typical of the remaining five.

Defendant's Exhibit 1 received without objection.

Counsel for defendant offers Defendant's Exhibit 2.

Defendant's Exhibit 2 received without objection.

Counsel for defendant offers Defendant's Exhibit 3.

Defendant's Exhibit 3 received without objection.

Counsel for defendant states it is admitted receipts call for total of 161,000 bags of flour, that the figures shown [36] on the proposed distribution scheme are correct.

Counsel for defendant—execution of Defendant's Exhibit 3 by Mr. Cornish, general manager of the American Overseas Warehouse Company, is admitted.

Mr. Kent argues.

Counsel for defendant serves notice that he will also show that the bags of flour called for by their godown warrants were never actually in the godown. Therefore, they hold godown warrants on something that did not exist.

. . . . . .

TESTIMONY OF R. T. McDONNELL, FOR PLAINTIFFS.

(Questions by Mr. KENT to Mr. McDONNELL.)

Q. You are the assignee of the defendant in this action? A. Yes.

Q. The warehouse business was incorporated for carrying on the business of warehousemen?

A. Yes.

Q. When you took over the godown how was the flour stored? A. It was stored in bulk.

COURT.—Q. In bulk?

A. In bags.

Q. Distinguished bags? A. Yes.

. . . . . .

Q. In this case the only distinction was brands?

A. Yes, that is all.

Q. Was there anything to distinguish the parcels of any particular brand? A. Nothing.

Q. Were there any names of any banks or other persons to indicate ownership? A. None. [37—2]

Q. Was there any indication that any of the flour belonged to the warehouse company?

A. None.

COURT.—Q. No indication that any of the flour belonged to any particular bank? A. No.

. . . . . .

Q. When you took over the books of the warehouse company did you take over the godown books? A. What was left.

(Testimony of R. T. McDonnell.)

Q. Were they in Chinese? A. Yes.

Q. Did you have them translated?

A. I had what I thought was the principal one, that was the godown keeper's tally-book.

Q. Now, the National City Bank are interested or claim to be interested, I think, in four brands of flour? A. Yes.

Q. Could you mention what these were?

A. Green Battleship, Lotus, Egyptian and Shanghai brand.

Q. Have you examined at my request the tabulated statement in regard to these various transactions? A. With the National City Bank?

Q. Yes. A. Yes.

Q. Have you checked the figures with your own godown accounts? A. Yes.

Q. And with your records as regards godown warrants? A. Yes.

Q. And in effect so far as you know, this tabulated statement is correct? A. Yes. [38—3]

Q. In regard to the Green Battleship in the godown on December 31, 1926, there were 14,000 bags and 24,000 bags received between January 1st and April 8th?

A. There were issued out 24,000 between those dates. Therefore, there were 14,000 in the godown as of that date, April 8th, which were subject to two godown warrants, March 8, 10,000 bags held by China & South Sea Bank and March 18th. This godown warrant for 30,000 bags is the result of that statement. There was no free flour which

(Testimony of R. T. McDonnell.)

could have been placed in godown on April 8, 1927, of this particular brand. On March 8th there had been 10,000 bags which remained subject to godown warrant.

Objection by counsel for defendant—this witness does not appear to know whether that godown warrant of March 8th referred to these particular bags or not.

Q. Mr. McDonnell, did you on this particular statement, the first statement, page 1, on Exhibit "E," form a conclusion that on April 8th there was no free flour?

Objection by counsel for defendant. Objection sustained.

Q. Do you recognize Exhibit "E" as being the tabulated statement which you have checked with the godown man's books and with your records of the warrants and of the transactions with the National City Bank? A. Yes.

Plaintiff's Exhibit "E" offered in evidence. Objection by counsel for defendant—it does not appear to show all of the godown warrants of the plaintiffs and the National City Bank.

Q. This first statement in regard to the Green Battleship brand is that a complete statement of the transaction in regard to that brand as between the 31st of December, 1926, and April 8, 1927? No godown warrants omitted or anything of that sort? A. Yes.

(Testimony of R. T. McDonnell.)

Q. It is a complete statement? A. Yes. [39—4]

(Question by Judge FRANKLIN.)

Q. Does it show all of the godown warrants upon which the plaintiffs in this case rely?

A. I think in this particular instance it has to do with godown warrants issued on Green Battleship brand.

Q. Does it show all of the godown warrants upon which the plaintiffs rely having to do with Green Battleship brand? A. During this period, yes.

Q. During what period?

A. Period from January 1st to April 8th, 1927.

Q. Do you know why that particular period was shown?

A. No, except they wanted to utilize this first transaction of the National City Bank.

COURT.—Q. There wasn't anything on there that shows the first transaction between the warehouse company and the National City Bank, 10,000, is that in the books, the first transaction?

A. No.

Q. There is nothing in the books to that effect, is there? There is not any entry in the books of the Overseas Warehouse Company showing this is the first transaction between the warehouse and the National City Bank, April 8, 1927, 10,000 bags?

A. No.

Q. That? A. Yes.

Q. And you just assumed that that is the first

(Testimony of R. T. McDonnell.)

transaction, you do not know that that is in the books, do you? A. No.

. . . . . .

(Questions by Mr. KENT.)

Q. The whole of this Exhibit "E," all these figures have been checked over by you? [40—5]

A. Yes.

Q. And they are correct? A. Yes.

Objection by counsel for defendant—conclusion of this witness as to whether they are correct or not.

Q. The books of which this record is a translation, are they still in your possession? A. Yes.

Q. Have they always been in your possession since you were appointed assignee? A. Yes.

Q. This Exhibit "E" includes four statements, one in regard to Battleship brand, one in regard to Lotus brand, one in regard to Egyptian brand and one in regard to Shanghai brand?

A. That is right.

Q. And those were the four brands in which the National City Bank was interested? A. Yes.

Q. Have you seen the documents in the National City Bank on which they rely? A. Yes.

Q. Are the dates of the various transactions at the right of these several notes correct? A. Yes.

Q. Are they the correct amounts? A. Yes.

Q. Are all the transactions enumerated in this Exhibit "E" National City Bank transactions?

A. Yes, in respect to flour.

(Testimony of R. T. McDonnell.)

Q. Is the godown man available in Tientsin as far as you know?

A. I think it is possible to get hold of him, but I am not sure.

Q. When you took over as assignee did you see the godown man? A. Yes.

Q. Did you go through his books with him, discuss the matter and [41—6] check these items up as far as possible?

A. It was extremely difficult to get anything from him because he has been under police surveillance from the period of 9th of July until I took over, the first of August, and then I kept him there for another week and he was quite frightened and it was almost impossible to divulge any information, and I took these books from him and got the information. This godown keeper's book was the exact tally as he made it of flour that went in the godown and went out of the godown without any reference to warrants issued.

(Questions by Judge FRANKLIN.)

Q. Do you know whether you received from this godown keeper all his books or not?

A. I am sure I did not.

Q. You are sure you did not? A. Yes.

Q. Have you any way of knowing whether his books are correct or not?

A. Except when we did check total amount of flour in the godown.

Q. That was your only way of testing your correctness? A. Yes.

(Testimony of R. T. McDonnell.)

COURT.—Q. What do you mean by total amount of flour in the godown?

A. I took over and checked with the godown, checked with the bookkeeper's book.

. . . . . .

Q. That is the only way you had of testing his records? A. That is all.

Q. Do you know whether he kept this record himself or not?

A. I do not believe he did. I think he had a writer in his office.

Q. This statement which has been marked Exhibit "E" does all of the merchandise on this Exhibit appear in the books, on April 14th there was no free flour available, does that appear?

A. No. [42—7]

Q. In his books does it appear that godown warrant No. 3928 was held by the National City Bank for 12,000 bags? Does that appear in the godown keeper's books? A. Not at all; no.

Q. You stated, I believe, that there is no relation between the godown keeper's books and the godown warrants issued to the plaintiffs and the National City Bank?

A. I believe there is no relation.

Counsel for defendant objects on several grounds—no foundation laid—does not purport to be even a correct copy of the godown keeper's books or summary. It includes statements gathered from the brain of my friend

Attorneys to stipulate to pay over to plaintiffs amounts not in dispute, keeping out sufficient to cover judgment.

. . . . . .

This case was brought up in the United States Court for China at Shanghai, China, Monday, August 27, 1928, upon motion for new trial filed by counsel for defendant.

Argument by Judge Franklin, answered by *L.* H. Kent, Esq.

Motion denied by Court.

Exception noted by Judge Franklin.

Judge Franklin makes oral motion for stay of execution for a period of two weeks.

Motion granted by Court. [44—9]

I, Louise M. Porter, Official Reporter of the United States Court for China, do hereby certify that the above and foregoing transcript, numbered pages 1 to 9, inclusive, contain all the testimony offered in the above-entitled matter, together with the objections of counsel and the rulings thereon by the Court.

(Sgd.) LOUISE M. PORTER,
Official Reporter, United States Court for China.

And now on this 8th day of September, 1928, the defendant presents this bill of exceptions, containing all of the evidence received upon the trial of this action or relating to the foregoing exceptions,

and prays that the same be allowed, signed, sealed and made a part of the record herein.

FLEMING, FRANKLIN & ALLMAN.
By C. S. FRANKLIN,
Attorneys for Defendant.

The foregoing bill of exceptions is hereby approved, allowed, settled and made a part of the record herein.

Shanghai, September 8, 1928.

MILTON D. PURDY,
Judge, United States Court for China. [45—10]

Cause No. 3067—Civil No. 1293. Petition for Appeal. Filed at Shanghai, China, September 8, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes the defendant above named by Fleming, Franklin & Allman, his attorneys, and conceiving himself aggrieved by the decision and judgment of the above-entitled court entered on the 16th day of July, 1928, in the above-entitled cause, does hereby appeal from said decision and judgment to the United States Circuit Court of Appeals for the Ninth Circuit and he prays that this his appeal may be allowed and that a transcript of the record and proceedings and papers upon which said decision and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals

for the Ninth Circuit. Dated at Shanghai, China, this 8th day of September, 1928.

FLEMING, FRANKLIN & ALLMAN.
By C. S. FRANKLIN,
Attorneys for Defendant. [46]

Cause No. 3067—Civil No. 1293. Assignment of Errors. Filed at Shanghai, China, September 8, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant above named by Fleming, Franklin & Allman, his attorneys, and hereby specifies the following as errors upon which he will rely in his appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause.

1. That the United States Court for China erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and the National City Bank of New York was that of pledgor and pledgee. (Decision and Judgment, pages 6 to 9, inclusive.)

2. That the United States Court for China erred in holding and deciding that the National City Bank of New York, having left with the American Overseas Warehouse Company, Inc., as bailee, certain fungible merchandise, was entitled to receive that particular merchandise only and that after a com-

mingling of such particular merchandise with other merchandise of a like [47] kind, the said National City Bank of New York could not participate *pro rata* in the commingled property.

3. That the United States Court for China erred in holding and deciding that the National City Bank of New York could not successfully claim any merchandise of a fungible nature left by it with the American Overseas Warehouse Company as bailee, without proving by competent evidence that the actual merchandise so left with the said American Overseas Warehouse Company was in the possession of the assignee of that Company at the time he took over as such assignee.

4. That the United States Court for China erred in holding and deciding that all of the transactions between the American Overseas Warehouse Company and the National City Bank of New York similar to the one illustrated by Exhibit 1, do not as a matter of law, place the National City Bank of New York in the position of a holder of a warehouse receipt.

5. That the United States Court for China erred in ordering the defendant to revise and re-adjust his proposal for the distribution of the proceeds in his hands from the sale of the flour found in the warehouses of the American Overseas Warehouse Company, Inc., when the same were taken possession of by the defendant as assignee.

6. That the United States Court for China erred in ordering the defendant not to recognize the claim of the National City Bank of New York as

being entitled to participate *pro rata* in the proceeds from the sale of said flour with the plaintiffs.

7. That the United States Court for China erred in not approving the scheme of distribution proposed by the defendant.

8. That the United States Court for China erred in denying defendant's motion for a new trial. [48]

WHEREFORE the said defendant prays that the decision and judgment of the United States Court for China dated the 16th day of July, 1928, be reversed and that the United States Court for China be directed to order distribution of the funds in defendant's hands in accordance with the defendant's proposed scheme of distribution or in the alternative that said judgment be reversed and the United States Court for China be directed to grant a new trial of the said cause.

Dated at Shanghai, China, September 8th, 1928.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,

Attorneys for Appellant (Defendant in the Above-entitled Cause). [49]

Cause No. 3067—Civil No. 1293. Order Allowing Appeal and Fixing Amount of Bond. Filed at Shanghai, China, Oct. 25, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

The petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decision and judgment in the above-entitled cause entered the 16th day of July, 1928, of the defendant above named having been presented to the Court, after due consideration of the same.

IT IS ORDERED that said appeal be allowed as prayed for and that the amount of cost and supersedeas bond on said appeal be and hereby is fixed in the sum of Mex. $60,000.00 conditioned as required by law and rule of this Court.

Dated at Shanghai, China, this 25th day of October, 1928.

MILTON D. PURDY,
Judge, United States Court for China. [50]

Cause No. 3067—Civil No. 1293. Bond on Appeal. Filed at Shanghai, China. Oct. 25, 1928. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, R. T. McDonnell, Assignee American Overseas Warehouse Company, Incorporated, as principal, and International Banking Corporation,

as surety, are held and firmly bound unto the above-named Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank, Ltd., Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng, hereinafter called "the appellees," in the sum of Seventy Thousand Dollars, local silver currency (Y$70000), to be paid to the said appellees, their successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30 day of September, 1928.

WHEREAS the above-named R. T. McDonnell, Assignee American Overseas Warehouse Company, Incorporated, is prosecuting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled suit by the Judge of the United States Court for China,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named R. T. McDonnell, Assignee American Overseas Warehouse Company, Incorporated, shall prosecute said appeal to effect, and if he fail to make said appeal good shall pay the judgment rendered by the United States Court for China on the 16th day of July, 1928, and answer all damages and costs, then this obligation

shall be void, otherwise the same shall be and remain in full force and virtue.

Dated at Tientsin, China, this 30 day of September, 1928.

(Sgd.) R. T. McDONNELL,
Assignee AMERICAN OVERSEAS WAREHOUSE COMPANY INCORPORATED.

For the International Banking Corporation.
(Sgd.) ————————,
Manager.

Approved.

(Sgd.) MILTON D. PURDY,
Judge, United States Court for China.

Approved by counsel for plaintiffs.
(Sgd.) P. H. B. KENT.
(KENT & MOUNSEY.) [51]

Cause No. 3067—Civil No. 1293. Citation on Appeal. Filed at Shanghai, China, Oct. 25, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To the Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Com-

mercial Bank Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise, and Shih Fu Sheng, GREETING:

You and each of you are hereby cited and admonished to be and appear at the next session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be held in the City of San Francisco, State of California, within sixty days from the date of service hereof pursuant to an appeal filed in the office of the Clerk of the United States Court for China, wherein R. T. McDonnell is appellant and the Bank of China, Bank [52] of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese-American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng are appellees, to show cause, if any there be, why the judgment rendered against the said appellant in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable MILTON D. PURDY, Judge of the United States Court for China, this 25th day of October, 1928.

MILTON D. PURDY,
Judge, United States Court for China.

We hereby this 6th day of November, 1928, accept

due personal service of this citation on behalf of the appellees.

(Signed) P. H. B. KENT,
(KENT & MOUNSEY),
Attorneys for Appellees. [53]

Cause No. 3067—Civil No. 1293. Praecipe for Transcript of Record. Filed at Shanghai, China, Nov. 12, 1928. (Signed) James M. Howes, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit pursuant to the appeal allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Complaint.
2. Answer.
3. Reply.
4. Defendant's Exhibits 1, 2 and 3.
5. Decision and judgment.
6. Motion for a new trial.
7. Bill of exceptions and order approving and settling same.
8. Petition for appeal.
9. Assignment of errors.

10. Order allowing appeal and fixing amount of bond. [54]
11. Cost and supersedeas bond.
12. Citation and service of same.
13. Copy of this praecipe.

—and file said transcript with the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Shanghai, China, this 1st day of November, 1928.

FLEMING, FRANKLIN & ALLMAN.
By C. S. FRANKLIN,
Attorneys for Defendant (Appellant).

I acknowledge having received a copy of this praecipe this 6th day November, 1928.

(Sgd.) P. H. B. KENT,
(KENT & MOUNSEY.) [55]

Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, November, 1928. ————, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR CHINA TO TRANSCRIPT OF RECORD.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that

the foregoing is a true and correct copy of the record and proceedings in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell etc., Defendant, Cause No. 3067, in this court, as required by praecipe filed by defendant on November 12, 1928, and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 30th day of November, 1928.

[Seal] JAMES M. HOWES,
Clerk. [56]

[Endorsed]: No. 5687. United States Circuit Court of Appeals for the Ninth Circuit. R. T. McDonnell, Assignee, American Overseas Warehouse Company, Inc., Appellant and Cross-Appellee, vs. Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng, Appellees and Cross-Appellants. Transcript of Record. Upon Appeal and Cross-Appeal from the United States Court for China.

Filed January 14, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5687

United States

Circuit Court of Appeals

For the Ninth Circuit.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LTD., BANK OF AGRICULTURE AND COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,

Cross-Appellants,

vs.

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,

Cross-Appellee.

Transcript of Record.

Upon Cross-Appeal from the United States Court for China.

Cause No. 3067—Civil No. 1293. Reply. Filed at Tientsin, China, 22 May, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

REPLY.

Now come the plaintiffs and respectfully show unto this Honorable Court by way of reply to the answer herein:

1. The plaintiffs deny that the National City Bank of New York is the holder of any godown warrants or documents of the American Overseas Warehouse Company, Incorporated, entitled to rank with the warrants held by the plaintiffs.

2. The plaintiffs admit that the said Bank holds certain documents bearing an endorsement by the said Warehouse Company as follows:

> "We have received the goods mentioned in this instrument and will hold same to the order of the NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK."

But the plaintiffs deny that the said goods were ever received by the said Warehouse Company as alleged in the said endorsement.

3. By way of alternative defense to the defendant's claim on behalf of the National City Bank of New York the plaintiffs deny that if any of the said goods were received by the said Warehouse

Company, they were received under such conditions as constituted a valid pledge thereof.

4. By way of further alternative defense the plaintiffs deny that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said company ceased to do business and from which date the assignment by the said company to the defendant as assignee operated.

(Sgd.) P. H. B. KENT,
Attorney for Plaintiffs.

EXHIBIT "D."

THE AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.

August 30, 1926.

Banque Franco-Chinoise Pour le Commerce et l'Industrie Tientsin.

Dear Sirs:—

We take pleasure in enclosing copy of our balance sheet audited as at June 30, 1926.

Out new godown on the corner of Korostovetz and Poppe Roads in the Third Special Area will soon be completed which together with our present godown at 29 Seymour Road, British Concession will be a convenience to our clients.

Many banking institutions in Tientsin are finding it convenient to have a neutral godown managed

by a company which does no import and export business. All of our clients appreciate the confidential nature of our business and bank's clients have no objection to having their cargo stored with *as.*

The usual rates are charged for storage and we insure all cargo placed in our godowns without cost to the owners.

We are prepared to advance money on goods stored in our godown thus being in a position to assist your clients, on your recommendations, in case they desire to borrow on cargo in which you are not interested.

Very truly yours,

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

Signed—C. H. CORNISH,

General Manager.

EXHIBIT "E."

Cause 3067. Exhibit "E." United States Court for China. Not admitted.

GREEN BATTLESHIP BRAND.

1st Transaction between the Warehouse Company and National City Bank, April 8th, 1927, 10,000 bags.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
In Godown. Dec. 31st, 1926.	14,135 bags	—	—
January 1st to April 8th	24,921 "	24,669 bags	—
March 8th	—	—	Nos. 3592/3 held by China and South Sea Bank—10,000 bags.
March 18th	—	—	Nos. 3607/12 held by Banque Franco-Chinoise—30,000 bags.

2nd Transaction between the Warehouse Company and National City Bank, April 21st, 1927, 15,000 bags.
On April 14th there was no free flour available to Union Trading Corporation to deal with as appears from above statement.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
April 9th to April 21st, 1927.	5,000 bags	—	—
April 1st to April 23rd.	—	1,680 bags	—
April 24th	3,100 bags	—	—
April 26th	5,000 bags	5,000 bags	No. 3626 held by China and South Sea Bank—10,000 bags.

GREEN BATTLESHIP BRAND.

3rd Transaction between the Warehouse Company and National City Bank, June 14th, 1927, 12,000 bags.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
April 27th—May 2nd, 1927.	11,533 bags	8,000 bags	—
May 2nd, 1927.	—	—	No. 3634 held by China and South Sea Bank (originally by Banque Franco-Chinoise)—15,000 bags.
May 3rd—June 3rd, 1927.	13,748 bags	13,563 bags	—
June 9th, 1927.	—	—	No. 3902 held by China and South Sea Bank—15,000 bags.
June 10th, 1927.	10,030 bags	—	—
June 12th to 16th, 1927.	—	1,838 bags	—
June 20th, 1927.	—	—	Nos. 2912/13 held by China and South Sea Bank—30,000 bags.

LOTUS BRAND.

1st Transaction between the Warehouse Company and National City Bank, March 22nd, 1927, 10,000 bags.

Date.	Received in Godown.	Issued Out of Godown	Godown Warrants.
In Godown Dec. 31st, 1926.	1,155 bags	—	—
January 1st to March 22nd, 1927.	6,092 "	6,000 bags	
March 29th.	—	—	No. 3615 held by Banque Franco-Chinoise—7,500 bags

2nd Transaction between the Warehouse Company and National City Bank, April 21st, 1927, 24,000 bags.

Date.	Received in Godown.	Issued Out of Godown	Godown Warrants.
April 21st, 1927.	23,976 bags	—	—
April 21st–April 28th, 1927.	—	675 bags	
April 28th, 1927.	—	—	No. 3630 held by Bank of Communications—20,000 bags.
June 3rd, 1927.	—	—	No. 3677 held by Bank of China—4,000 bags.
June 27th, 1927.	—	—	No. 3921 held by China & South Sea Bank —20,000 bags.
Between April 21st & July 7th, 1927.	—	9,847 bags	—
July 5th, 1927.	12,000 bags	—	—
July 7th, 1927.	—	—	No. 3928 held by The National Commercial Bank—12,000 bags.

EGYPTIAN BRAND.

1st Transaction between the Warehouse Company and National City Bank, April 5th, 1927, 35,000 bags.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
In Godown December 31st, 1926.	8,797 bags	—	—
Jan. 1st—April 4th, 1927.	—	3,000 bags	—
April 4th, 1927.	15,002 bags	—	—
April 30th.	14,943 bags	—	—
April 4th—30th.	—	19,717 bags	—
May 1st—31st.	—	15,073 bags	—
	38,742 bags	37,790 bags	

2nd Transaction between the Warehouse Company and National City Bank, June 14th, 1927, 20,000 bags.

May 23rd	—	—	Warrant No. 3661 (subsequently exchanged for Warrant No. 3919) for 60,000 bags against Bill of Lading surrendered by Bank to obtain delivery.
June 1st	36,994 bags	—	—
June 2nd	22,981 bags	—	—
June 1st—13th	—	39,130 bags	—
June 14th—30th	—	15,262 bags	
July 7th	150 bags	2,040 bags	
	60,125 bags	56,432 bags	

SHANGHAI PLAIN ALTERNATIVELY REFERRED TO AS SHANGHAI FLOUR.

(Note: This is not a brand but a name to cover flour from broken bags rebagged in plain bags, irrespective of brand. There is no record in the books.)

1. Jan. 1st to July 9th, 1927. Amount issued from godown, according to endorsements on warrants.....22,000 bags
2. Prior to April 5th, 1927, the date of the first transaction in which the National City Bank was interested, the amount being 10,000 bags, the following godown warrants were issued:

   No. 3539. January 6th, 1927, held by China and South Sea Bank ..... 10,000 bags

   No. 3540. January 6th, 1927, held by China and South Sea Bank ..... 10,000 bags

   No. 3541. January 6th, 1927, held by China and South Sea Bank ..... 10,000 bags
3. Prior to May 9th, 1927, the date of the second transaction in which the National City Bank was interested, which was for 15,000 bags, the following warrants were issued:

   No. 3645. May 5th, 1927, held by China and South Sea Bank ..... 4,000 bags

   No. 3646. May 5th, 1927, held by China and South Sea Bank ..... 5,000 bags

The following warrants were issued subsequent thereto:

No. 3917.	June 1st, 1927, held by China and South Sea Bank 20,000 less 10-000 delivered	10,000 bags
No. 3918.	June 3rd, 1927, Shih Fu Sheng 20,000 less 12,-000 delivered	8,000 bags

EXHIBIT "F."

Cause 3067. Exhibit "F." United States Court for China. Not admitted.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

Telephone: 2509 South Office

Telegram Address "Aowco" Tientsin.

Head Office:
Wilmington, Delaware, U. S. A.
Hsin Chung Bldg., Bromley Road, Tientsin.

September 3, 1926.

Chung Foo Union Bank
Tientsin

Dear Sirs:

Yesterday when the general manager was making a personal inspection of the condition of the cargo in our godown at No. 29 Seymour Road that part of the godown in which the flour belonging to the Union Trading Corporation was *store* for your account was found to have a lock placed there by your institution.

We are a neutral warehouse company and assume responsibility for all cargo covered by our godown warrants and demand that the lock be removed from our premises at once. If you are unwilling to do this we are in a position to recommend another banking institution to the Union Trading Corporation or to advance money against this cargo ourselves.

If the lock is not removed from our premises this afternoon we shall request the Union Trading Corporation to remove the cargo from our premises.

We permit no one to place locks on our godowns other than ourselves nor do we permit any sign or seals to be placed on our doors. Anyone who is unwilling to comply with our rules we must ask to ma*d*e other arrangements.

A copy of this letter is b*r*ing sent to the Union Trading Corporation for their information.

Very truly yours,

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

C. H. CORNISH,
General Manager.

CHC:ETC.

[Two characters appear here that were difficult to decipher.]

Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, November 30, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED STATES COURT FOR CHINA TO TRANSCRIPT OF RECORD.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell, etc., Defendant, Cause No. 3067, as required by praecipe filed by plaintiff on November 12, 1928, and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 30th day of November, 1928.

[Seal] JAMES M. HOWES,
Clerk.

Cause No. 3067—Civil No. 1293. Petition for Appeal. Filed at Shanghai, China, October 9th, 1928. (Signed) James M. Howes, Clerk.

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

The plaintiffs above named, by Kent and Mounsey, their attorneys, conceiving themselves aggrieved by the decision and judgment made and entered in the United States Court for China on July 16th, 1928, in the above-entitled proceedings so far as concerns the order that the defendant apportion to the National City Bank of New York a sum proportionate to the flour covered by warrant No. 3621 dated April 8th, 1927, and that accordingly the defendant pay to the National City Bank of New York either the sum of Mexican $6,600.90 or Mexican $3,300.45 according as the defendant took over flour of Green Battleship brand only or of both Green and Red Battleship from the American Overseas Warehouse Co., Inc., as assignee thereof, do hereby appeal from said decision and judgment in the foregoing respect to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this appeal may be allowed, that citation issue as provided by law and that a transcript of the record and proceedings and papers upon which said decision and judgment was made, duly authenticated, may be sent to the United States Circuit *Court for* the Ninth Circuit.

Dated at Tientsin, China, this 3d day of October, 1928.

(Signed) KENT & MOUNSEY,
Counsel for Plaintiffs-Appellants,
2 & 4 Victoria Terrace, Tientsin, North China.

And now, to wit, on the 20th day of October, 1928, IT IS ORDERED that the appeal be allowed as prayed.

(Signed) MILTON D. PURDY,
Judge, United States Court for China.

Citation waived November 12th, 1928.
FLEMING, FRANKLIN & ALLMAN,
Attorneys for Defendant.

Cause No. 3067—Civil No. 1293. Assignment of Errors. Filed at Shanghai, China, October 9th, 1928. (Signed) James M. Howes, Clerk.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the plaintiffs above named, by Kent and Mounsey, their attorneys, and in furtherance of their appeal make and file this their assignment of errors which they aver occurred in the trial and decision of this cause in the United States Court for China.

1. The Court erred in finding and deciding in its decision and judgment filed July 16th, 1928, that the National City Bank of New York was entitled

to participate in the proceeds of flour held by the defendant as assignee of the American Overseas Warehouse Co., Inc., in respect of Warrant No. 3621, dated April 8th, 1927, held by the National City Bank of New York and purporting to have been issued by the American Overseas Warehouse Company, Incorporated, in respect of 10,000 bags of Green Battleship flour and 10,000 bags Red Battleship flour.

2. The Court erred in not holding and deciding that warrant No. 3621 aforesaid purporting to have been issued in respect of certain flour, having been issued by the American Overseas Warehouse Company, Incorporated, in support of and subsequent to an assignment to the National City Bank of New York of the benefit of an alleged pledge of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated the 8th day of April, 1927, was of no effect.

3. The Court erred in not holding and deciding that the National City Bank being already assignee of the benefit of an alleged pledge of the flour purporting to be covered by warrant No. 3621 aforesaid, the said warrant was taken by the Bank with notice that the Warehouse Company only purported to have a special property in the said flour as pledgee, and was not in a position to issue in respect thereof a negotiable receipt such as the said warrant constituted.

4. The Court erred in not holding and deciding that the effect of godown warrant No. 3621 afore-

said in the hands of the National City Bank of New York was limited to the effect of the assignment of the benefit of an alleged pledge in respect of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated on the same day, namely, April 8th, 1927, but prior to the issue of the said warrant.

5. The Court erred in not holding and deciding that the transactions between the Union Trading Corporation and the American Overseas Warehouse Company, Incorporated, and the assignments thereof to the National City Bank of New York were not transactions in the ordinary course of the business of the American Overseas Warehouse Company, Incorporated, as warehousemen and could not be made the subject of godown warrants.

6. The Court erred in not finding and deciding that the position of the American Overseas Warehouse Company, Incorporated, in respect of the flour purporting to be covered by warrant No. 3621 aforesaid, could not be in a better position as pledgee than if purporting to be owner thereof, and that since a warehouseman cannot issue a valid warehouse receipt in respect of his own property the Warehouse Company could not issue a valid negotiable receipt in respect of the flour of which it was only an alleged pledgee.

7. The Court erred in not finding and deciding that a warehouseman cannot issue a valid warehouseman's receipt by way of security for his own indebtedness and that in consequence godown war-

to participate in the proceeds of flour held by the defendant as assignee of the American Overseas Warehouse Co., Inc., in respect of Warrant No. 3621, dated April 8th, 1927, held by the National City Bank of New York and purporting to have been issued by the American Overseas Warehouse Company, Incorporated, in respect of 10,000 bags of Green Battleship flour and 10,000 bags Red Battleship flour.

2. The Court erred in not holding and deciding that warrant No. 3621 aforesaid purporting to have been issued in respect of certain flour, having been issued by the American Overseas Warehouse Company, Incorporated, in support of and subsequent to an assignment to the National City Bank of New York of the benefit of an alleged pledge of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated the 8th day of April, 1927, was of no effect.

3. The Court erred in not holding and deciding that the National City Bank being already assignee of the benefit of an alleged pledge of the flour purporting to be covered by warrant No. 3621 aforesaid, the said warrant was taken by the Bank with notice that the Warehouse Company only purported to have a special property in the said flour as pledgee, and was not in a position to issue in respect thereof a negotiable receipt such as the said warrant constituted.

4. The Court erred in not holding and deciding that the effect of godown warrant No. 3621 afore-

said in the hands of the National City Bank of New York was limited to the effect of the assignment of the benefit of an alleged pledge in respect of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated on the same day, namely, April 8th, 1927, but prior to the issue of the said warrant.

5. The Court erred in not holding and deciding that the transactions between the Union Trading Corporation and the American Overseas Warehouse Company, Incorporated, and the assignments thereof to the National City Bank of New York were not transactions in the ordinary course of the business of the American Overseas Warehouse Company, Incorporated, as warehousemen and could not be made the subject of godown warrants.

6. The Court erred in not finding and deciding that the position of the American Overseas Warehouse Company, Incorporated, in respect of the flour purporting to be covered by warrant No. 3621 aforesaid, could not be in a better position as pledgee than if purporting to be owner thereof, and that since a warehouseman cannot issue a valid warehouse receipt in respect of his own property the Warehouse Company could not issue a valid negotiable receipt in respect of the flour of which it was only an alleged pledgee.

7. The Court erred in not finding and deciding that a warehouseman cannot issue a valid warehouseman's receipt by way of security for his own indebtedness and that in consequence godown war-

rant No. 3621 aforesaid held by the National City Bank of New York invalid and of no effect.

8. The Court erred in finding and deciding that the legal effect of the transaction between the American Overseas Warehouse Company, Incorporated, and the National City Bank of New York was that the Bank had deposited with the American Overseas Warehouse Company, Incorporated, the flour purporting to be covered by godown warrant No. 3621 aforesaid.

WHEREFORE, the plaintiffs pray that the decision and judgment of the United States Court for China dated the 16th day of July, 1928, be reversed so far as concerns the order to pay to the National City Bank of New York a portion of the proceeds of flour in the hands of the defendant and that the United States Court for China be directed to order distribution of the balance of the said proceeds in the defendant's hands amongst the plaintiffs in accordance with the principles of distribution adopted as amongst the plaintiffs in respect of proceeds of the said flour already distributed.

Dated at Tientsin, China, the 3d day of October, 1928.

(Signed) KENT & MOUNSEY,
Counsel for Plaintiffs-Appellants,
2 & 4 Victoria Terrace, Tientsin, North China.

Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Petition for Appeal and Assignment of Errors. Filed at Shanghai, China, 4 Jan., 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR CHINA TO PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the petition for appeal and assignment of errors in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell, etc., Defendant, Cause No. 3067, as required by amended praecipe filed by plaintiff and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 28th day of December, 1928.

[Seal] JAMES M. HOWES,
Clerk.

[Endorsed]: Filed Jan. 24, 1929. Paul P. O'Brien, Clerk.

For the Exchange Bank of China, Tientsin,
T. H. SING,
Assistant Manager.

Banque Franco-Chinoise Pour le Commerce et l'Industrie.
H. BAR.
J. REINSTRA.

Executed by the several plaintiffs in the presence of:

P. H. B. KENT,
Barrister-at-Law, Tientsin.

China & South Sea Bank, Ltd.,
Y. P. LI,
Sub-manager.

The National Commercial Bank, Ltd.,
E. N. CHU,
Sub-Manager.

The Agricultural & Industrial Bank of China,
W. C. CHANG,
Manager.

Chung Yuan Industrial Bank,
(In Chinese Characters),
C. T. LU.

Approved.
(Sgd.) FLEMING, FRANKLIN & ALLMAN,
Attorneys for Defendant.

Approved.
(Sgd.) RICHARD T. EVANS,
Counsel for Defendant.

Oct. 6, 1928.

Approved 12 Nov., '28.

(Sgd.) MILTON D. PURDY,
Judge, United States Court for China.

Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, January 25, 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR CHINA TO TRANSCRIPT OF RECORD.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the bond on appeal in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell, etc., Defendant, Cause No. 3067, as required by amended praecipe filed by plaintiffs on January 24, 1929, and as the original thereto appears on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 25th day of January, 1929.

[Seal] JAMES M. HOWES,
Clerk.

[Endorsed]: Filed Feb. 12, 1929. Paul P. O'Brien, Clerk.

Cause No. 3067—Civil No. 1293. Affidavit of Service. Filed at Shanghai, China, February 4th, 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE.

Republic of China,
Province of Chihli,
City of Tientsin,
Consulate General of the United States of America,—ss.

I, Percy Horace Braund Kent, Barrister-at-Law at Tientsin in China, make oath and say as follows:

1. I am a partner in the firm of Kent and Mounsey and a counsel for the plaintiffs-appellants in this case. Counsel for the defendant-appellant is C. S. Franklin, of the firm of Fleming, Franklin & Allman at Shanghai in China.

2. On the 3d day of October, 1928, my said firm addressed a letter to Messrs. Fleming, Franklin & Allman enclosing copy of petition for appeal and assignment of errors filed on behalf of the plaintiffs-appellants with the Clerk of the United States Court for China, and notifying Messrs. Fleming, Franklin and Allman that a bond for Mex. $2,000 would be filed in due course. The said letter was registered. A copy of the said letter marked "P. H. B. K. 1" is produced and shown to me and

attached hereto. The postal registration slip marked "P. H. B. K. 2" is produced and shown to me and attached hereto.

3. By letter dated October 31st, 1928, Messrs. Fleming, Franklin & Allman, without specifically acknowledging service of the above two pleadings or receipt of the letter, replied in substance to the said letter exhibited hereto as aforesaid, and undertook to endorse waiver of citation on plaintiffs-appellants' said petition for appeal. They also promised to approve plaintiffs-appellants' appeal bond in due course. Messrs. Fleming, Franklin & Allman's letter marked "P. H. B. K. 3" is produced and shown to me and attached hereto.

4. The appeal bond filed herein on behalf of the plaintiffs-appellants was approved by R. T. Evans, attorney and counsellor at law at Tientsin, acting as agent for Messrs. Fleming, Franklin & Allman, and a copy served on the said R. T. Evans. To the best of my knowledge and belief a copy was also sent to Messrs. Fleming, Franklin & Allman, who as stated in paragraph 2 hereof has been previously advised in the matter of the appeal bond in the letter exhibited hereto and marked "P. H. B. K. 1" and has undertaken to approve the same by their letter in reply marked "P. H. B. K. 3."

5. Waiver of citation and the order of the Judge were endorsed upon the plaintiffs-appellants' petition for appeal.

6. I verily believe that all proper service has been

made upon counsel of the defendant-appellant herein of all documents.

(Sgd.) P. H. B. KENT.
PERCY HORACE BRAUND KENT.

Sworn at Tientsin by the said Percy Horace Braund Kent, the 30th day of January, 1929.

Subscribed and sworn to before me,

GRP. (Sgd.) GEORGE R. PASCHAL,
United States Vice-consul, Tientsin.

American Consulate General.
(Fee Stamp.)
Jan. 30, 1929. Misc. Service.
Tientsin, China. No. 320

(Copy)

"P. H. B. K. 1"

3rd. October, 1928.

Messrs. Fleming, Franklin & Allman,
24, The Bund,
Shanghai.

Dear Sirs,

Bank of China et als. v. R. T. McDonnell.

In continuation of our letter of the 1st. instant, we beg to enclose copy of petition for appeal and Assignment of Errors, originals of which we are despatching to-day to the Clerk of the United States Court for China. We also enclose copy of covering despatch.

You will notice that we have endorsed on the Petition for Appeal a waiver of citation. We shall be much obliged if you will attend at the Court and

complete this endorsement, in response to which we will of course perform any similar office you may require. We shall be glad if you will inform us that this is in order and, if not, whether you expect us to file citation.

We regret that our unfamiliarity with procedure on appeal prevents us from understanding either the form or the reason for the Bill of Exceptions. We presume its object is to advise the Appeal Court of your objections to part of the evidence, which presumably they will rule upon before taking into consideration the evidence in question. We presume that we are not under any obligation to put in a document of this kind, although we notice that our Exhibits "A," "B," and "C" are not referred to, which appears to us to stultify the certificate of the Official Reporter and your contention that the Bill of Exceptions contains all the evidence received upon the trial of the action. You will recall that our Exhibits "A," "B" and "C" were attached to the Complaint in pursuance of the rules of the Remedial Code. We should be grateful for some indication as to how this omission should be remedied.

We understand from Mr. Evans that in due course you will submit for our approval the draft Record, which for convenience and saving time will presumably be a printers' proof.

With reference to the Bond, we have suggested to Mr. Evans the sum of Mex. $70,000.00 and we hear from him that this is quite in order. We are pro-

and are admitted in our answer. They will of course be incorporated with the complaint in the record on appeal.

The Clerk of the Court has asked if we could obtain for him a copy of your Exhibit "C," being McDonnell's distribution scheme. We have not an extra copy ourselves, but if you could send one to us, it would save the Clerk the labor of making a copy.

Yours faithfully,
FLEMING, FRANKLIN & ALLMAN,
(Signed) By C. S. FRANKLIN.

CSF:MT.

Cause No. 3067—Civil No. 1293. Acknowledgment of Service. Filed at Shanghai, China. February 5, 1929. L. T. Kenake, Asst. Clerk.

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE.

Now comes the defendant above named by Fleming, Franklin & Allman, his attorneys, and acknowledges due service of the following pleadings filed by the plaintiff above named, to wit, petition for appeal, assignment of errors, appeal bond and citation. This acknowledgment of service is filed at the request of Coun*cil* for the plaintiff.

Dated at Shanghai, China, this 5th day of February, 1929.

FLEMING, FRANKLIN & ALLMAN.
By C. S. FRANKLIN,
Attorneys for Defendant.

Cause No. 3067—Civil No. 1293. Praecipe for Transcript of Record. Filed at Shanghai, China, 12 Nov. '28. John M. Howes, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellant designates the following as the portions of the record in this cause to be incorporated into the transcript on its appeal:

1. Complaint filed April 27th, 1928.
2. Answer filed May 17th, 1928.
3. Reply filed May 19th, 1928.
4. Plaintiffs' Exhibits "A," "B," "C," "D," "E," "F."

(Sgd.) P. H. B. KENT,
(KENT & MOUNSEY, Tientsin.)
Counsel for Plaintiffs-Appellants.

Cause No. 3067—Civil No. 1293. Praecipe for Transcript of Record. Filed at Shanghai, China, 3 Jan., 1929. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellants designate the following as the portions of the record in this cause to be incorporated into the transcript on its appeal:

1. Complaint filed April 27th, 1928.
2. Answer filed May 17th, 1928.
3. Reply filed May 19th, 1928.
4. Plaintiffs' Exhibits "A," "B," "C," "D," "E," "F."
5. Plaintiffs' petition of appeal.
6. Plaintiffs' assignment of errors.

(Sgd.) P. H. B. KENT,
(KENT & MOUNSEY),
Counsel for Plaintiffs-Appellants.

Cause No. 3067—Civil No. 1293. Praecipe for Transcript of Record. Filed at Shanghai, China, 24 Jan., 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellants designate the following as the portions of the record in this cause to be incorporated into the transcript on its appeal:

1. Complaint filed April 27th, 1928.

2. Answer filed May 17th, 1928.
3. Reply filed May 19th, 1928.
4. Plaintiffs' Exhibits "A," "B," "C," "D," "E," "F."
5. Plaintiffs' petition of appeal.
6. Order allowing plaintiffs' appeal.
7. Plaintiffs' assignment of errors.
8. Endorsement of defendant's waiver of citation by plaintiffs.
9. Plaintiffs' bond.

(Sgd.) P. H. B. KENT,
KENT & MOUNSEY,
Counsel for Plaintiffs-Appellants.

Cause No. 3067—Civil No. 1293. Praecipe for Transcript of Record. Filed at Shanghai, China, 4 Feb., 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellants designate the following portions of the record in this cause to be incorporated in a supplemental transcript on its appeal supplementing the documents named in the praecipes already filed herein.

1. Affidavit of service on counsel for defendant-appellant of plaintiffs-appellants' petition of appeal, assignments of errors and appeal bond.
2. Certificate by counsel of defendant-appellant

of service of documents above referred to and waiver of citation.

3. Certificate that appeal bond has been approved by Judge of U. S. Court.

4. Praecipe and supplemental praecipe filed herein.

P. H. B. KENT,
Counsel for Plaintiffs-Appellants

Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, February 7, 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR CHINA TO TRANSCRIPT OF RECORD.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the—

(1) Affidavit of service on counsel for defendant-appellant of plaintiffs-appellants' petition of appeal, assignment of errors and appeal bond.

(2) Certificate by counsel of defendant-appellant of service of documents above referred to and waiver of citation.

(3) Praecipe and supplemental praecipes filed herein

—filed in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell, etc., Defendant, Cause No. 3067, as required by supplementary praecipe filed by plaintiffs, and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 7th day of February, 1929.

[Seal] JAMES M. HOWES,
Clerk.

[Endorsed]: Additional Appeal Papers Required by Supplemental Praecipe of Plaintiffs. Filed Feb. 28, 1929. Paul P. O'Brien, Clerk.

No 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

vs

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants

BRIEF FOR CROSS-APPELLANTS

P. H. B. KENT,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Cases Cited, and Other Authorities Referred To

No 5687

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Appellees and Cross-Appellants

BRIEF FOR CROSS-APPELLANTS

I

STATEMENT OF THE CASE

The only two issues on cross-appeal are of law.

One: In this action of debt, in United States jurisdiction in China where common law strongly prevails, defendant cross-claiming, with profert in the pleadings,—was the judgment on the cross-claim responsive?

Two: On said cross-claim, which was on behalf of the National Bank of New York,—were certain "go-down warrants or trust receipts" held by that Bank equivalent in law to the warehouse receipts held by plaintiffs, the Chinese Banks?

Owing to omissions in federal appellate procedure at the trial and in preparation of appeal, cross-appellants acknowledge themselves limited, under appellate decisions, to presenting for review only the pleadings and judgment, the errors in the judgment being indicated in the assignment of errors.

China Press v Webb, 7 F 2d 581, 582
Wulfsohn v Russo-Asiatic Bank, 11 F 2d 715, 716

In the latter case, where a somewhat similar situation existed, this Court was of opinion, in the language of Circuit Judge Rudkin, that "The only questions subject to review, therefore, are rulings made during the progress of the trial, to which exceptions were reserved, and errors apparent from an inspection of the pleadings, process, and judgment".

Appeal from China is procedurally most difficult. This Court has borne with the situation very considerately. Our treaties with China obligate our government to maintain an adequate jurisdiction, including that of appeal. The Judge of our Court for China is given by statute extraordinary power to develop and administer the procedure of the Court, and the successive Judges have done much in such direction; but the Consular Court procedure with which they began in 1906 had become very firmly established, and in important features that procedure is necessitated

by conditions in China. To require, as the *Act of Congress, 34 St L 814, Sec 3,* does, that appeals or writs of error "shall be regulated by the procedure governing appeals within the United States from the district courts to the circuit courts of appeals" is an extraordinary burden for the China jurisdiction. Yet with the some twenty cases decided on appeal at San Francisco since the United States Court for China was created, we observe that only three have been outright dismissed, and those all in the year 1909 and for the sole reason that as judgments in actions at law the only way the judgments could have been brought for review was by writ of error,—a ground of dismissal we believe not now effective in view of enactment of the statute abolishing the writ. But there have been very many elements of the cases appealed from China that have failed of review, notwithstanding the considerate and constructively helpful adjudication maintained by the Circuit Court of Appeals.

However, the cross-appeal now before the Court we believe presents sufficiently for review the issues above mentioned.

The Chinese Banks brought action at Tientsin, China, against the assignee of an American warehouse company who had taken over from the company certain stored goods lying in the warehouse. The warehouse company had issued in favor of the Chinese Banks severally certain warehouse receipts for a total of 996,500 bags of certain brands of flour. The Chinese Banks presented the receipts before the assignment.

Delivery was refused. This led to discovery of shortage. The assignee, on taking over, found, instead of 996,500 bags of flour, only 91,666 bags. The brands were, however, the same as those specified in the warehouse receipts held by the Chinese Banks. Upon consent the assignee sold the 91,666 bags, realizing $300,489.86 Tientsin currency (exchange, we are informed, being at date of commencing this action such that one Tientsin dollar was equivalent on telegraphic transfer to San Francisco to forty-six and seven-eights cents United States currency). Upon realizing this amount the assignee proposed distribution. He recognized the validity of the warehouse receipts held by the Chinese Banks, but he also recognized as legally equivalent to them certain six documents held by the Tientsin office of the National City Bank of New York and described by that bank as "godown warrants or trust receipts" and representing a total of 161,000 bags of certain brands of flour stored, or supposed to be stored, in the warehouse. The Chinese Banks then brought this action against the assignee as indebted to them in the amount of proceeds of the sale of flour less the assignee's expenses and compensation for services. The assignee answered admitting all allegations of the complaint, including as part thereof the validity of documents including the warehouse receipts held by plaintiffs and represented by said documents, excepting only that he denied Paragraph 9 of the complaint, Tr 3. Paragraph 9 reads:

> "The plaintiffs deny that the National City Bank of New York is entitled to the said sum of $53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum

> should be distributed amongst such of their number as hold warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant."

And the answer alleged the legal equivalency of the documents held by the National City Bank with the warehouse receipts held by the Chinese Banks. The plaintiffs, in pleading their reply, denied this equivalency; admitted the National City Bank held the documents endorsed to itself, including admission textually of the endorsement to the National City Bank, but denied the goods referred to had been received by the warehouse company; alternatively, denied that if any of these goods were received, they were received under conditions constituting a valid pledge; and, again alternatively, that if received, the warehouse company was retaining the same in storage or having any property in them in respect of any such pledge when the warehouse company turned the goods over to the assignee.

Judgment was for the Chinese Banks to extent of all but 20,000 bags of the 161,000 claimed for the National City Bank, also as to 10,000 additional bags "in event that no flour of "Red Battleship" brand was taken over by the assignee".

The assignee appeals, and the Chinese Banks cross-appeal.

II

SPECIFICATION OF THE ERRORS RELIED UPON

Under the limitation accepted by the cross-appellants, the errors relied upon are those apparent upon the face of the record. Inspection of the pleadings and the judgment makes apparent two such errors.

In speaking of the judgment we refer to the language of the Court which is the last paragraph of what is designated "Decision and Judgment" and particularly to that part of the judgment from which the cross-appellants appeal, the language of which is:

> " . . . allotting to the National City Bank of New York $6,600.90, or $3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee, . . . and thereupon defendant is ordered to pay and distribute the same . . . to the National City Bank upon receiving their receipts therefor."

The references to Assignment of Errors are to the paper so entitled in the Transcript of Record upon Cross-Appeal and printed in the Transcript at pages 91-4; and the numbers given in the references are to the paragraphs so numbered in said Assignment of Errors.

Error One: The judgment does not conform to and is not supported by pleadings in an action of debt in which the pleadings included writings that defendant admitted proved the debt;

Error Two: Tho judgment is based upon holding a certain document to be a warehouse receipt which was, upon face of the record:

1 Fraudulent on part of the warehouse;

2 Of no effect because of prior assignment of the goods;

3 Taken with notice of being of no effect;

4 Or if of effect, then limited by prior assignment;

5 Issued out of course of legitimate warehouse business;

6 Issued for goods the property of a third party;

7 Issued to secure the warehouseman's own debt;

8 Not accompanied with possession required by law.

(Above matters numbered *1* to *8* are more fully stated in the Assignment of Errors, Tr. 91-4 and infra.)

From the complaint we quote Paragraphs 4-9 and prayer, and from the answer all paragraphs and prayer; we quote the reply, and the judgment; also parts of plaintiffs' Exhibit C, and all of defendant's Exhibits 2 and 3.

COMPLAINT: 4. The plaintiffs are severally holders of warrants issued by the Warehouse Company which call collectively for the delivery of 996,500 bags of flour of various brands. The said warrants have been submitted to the defendant and recognized by him, and such recognition has been confirmed by letter dated the 5th day of April, 1928, which is attached hereto. There is also attached hereto warrant No. 3671 in favour

of the Bank of China which is in the form of the several warrants above mentioned and which was the usual form of warrant issued by the Warehouse Company.

5. On or about the 9th day of July, 1927, the plaintiffs demanded delivery of the said 996,500 bags of flour against the said warrants, but the Warehouse Company refused to make any deliveries and on investigation by Messrs Borrows and Company, Limited, a firm of surveyors, it was estimated that the godowns of the Warehouse Company contained 91,895 bags of flour which on count was corrected to 91,666 bags only.

6. The said flour being part of the merchandise taken over by the defendant as stated in paragraph 3 hereof was sold, with the consent of the warrant holders, on or about the 16th day of September, 1927. The said flour realized a sum of $300,489.86 which is held by the defendant.

7. On or about the 17th day of January, 1928, the defendant issued a proposal for distribution of the said sum of $300,489.86, a copy of which is attached hereto.

8. The said scheme of distribution includes an allotment in favour of the National City Bank of New York, amounting to $53,137.32.

9. The plaintiffs deny that the National City Bank of New York is entitled to the said sum of $53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum should be distributed amongst their number as hold warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant.

The plaintiffs therefore claim:

1. That the defendant as such assignee is indebted to the plaintiffs severally in sums aggregating $300,489.86, less expenses.

2. That the defendant shall hold the said sum of $300,489.86, less expenses, for the account of

the plaintiffs and shall distribute the same proportionately amongst the plaintiffs in accordance with the principle of the defendant's proposal for distribution above referred to copy of which is attached hereto.

3. Costs. 4. Such further and other relief as to this Honorable Court seems meet.

(Attached are copies of Exhibits made part of the Complaint: *A* Letter of defendant to plaintiffs' counsel recognizing their warrants as valid; *B* Form of plaintiffs' warrants; *C* Proposed distribution of proceeds.)

ANSWER: 1. The defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the plaintiffs' complaint.

2. The defendant denies the allegations contained in paragraph 9 of the plaintiffs' complaint, and alleges that the National City Bank of New York is the owner and holder of six certain godown warrants or trust receipts issued to said bank by the American Overseas Warehouse Company, Inc., which call collectively for the delivery of 161,000 bags of flour of various brands, and therefore said Bank is entitled to participate *pro rata* in the distribution referred to in plaintiffs' complaint.

Wherefore defendant prays that the plaintiffs' complaint be dismissed at plaintiffs' cost, and that he be given such further and other relief as to the Court may seem meet and just in the premises.

REPLY: 1. The plaintiffs deny that the National City Bank of New York is the holder of any

godown warrants or documents of the American Overseas Warehouse Company, Incorporated, entitled to rank with the warrants held by the plaintiffs.

2. The plaintiffs admit that the said Bank holds certain documents bearing an indorsement by the said Warehouse Company as follows: "We have received the goods mentioned in this instrument and will hold the same to the order of the National City Bank of New York and we hereby transfer all our rights under this instrument to the National City Bank of New York." But the plaintiffs deny that the said goods were ever received by the said Warehouse Company as alleged in the said endorsement.

3. By way of alternative defense to the defendant's claim on behalf of the National City Bank of New York, the plaintiffs deny that if any of the said goods were received by the said Warehouse Company, they were received under such conditions as constituted a valid pledge thereof.

4. By way of further alternative defense the plaintiffs deny that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said Company ceased to do business and from which date the assignment to the defendant as assignee operated.

JUDGMENT: It is accordingly ordered, adjudged and decreed that the defendant revise and readjust his proposal for the distribution of the proceeds in his hands from the sale of the flour, in accordance with this opinion; allotting to the National City Bank of New York $6,600.90, or $3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee,

and increasing the allotments to the plaintiffs herein, as their interests may appear, and thereupon defendant is ordered to pay and distribute the same when so reallotted, to the several plaintiffs and to the National City Bank upon receiving their receipts therefor. Costs will not be awarded to either party.

EXHIBIT "C".

AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.

(In Liquidation)

PROPOSED DISTRIBUTION OF PROCEEDS FROM SALE OF FLOUR

The results were arrived at as follows:

From the amount available for distribution, $300,489.86, three per cent or $9,014.70 was deducted as trustee's fee leaving a balance of $291,475.16.

This amount, $291,475.16 was prorated on the basis of the total proceeds of the sale, $301,561.02, resulting in the following percentages:

Lotus	.30741	per cent =	$ 89,602.38
Green Battleship	35763	" =	104,240.26
Wheelbarrow	.14423	" =	42,039.46
Green Bamboo	.04961	" =	14,460.08
Egyptian	.04984	" =	14,527.12
Plain	.07162	" =	20,875.45
Double Fish	.01024	" =	2,984.71
Queen	.00092	" =	268.16
Green Castle	.00303	" =	883.17
Red Castle	.00182	" =	530.49
Mixed	.00365	" =	1,063.88
	1.00000	per cent	$291,475.16

The amount allocated to each brand was then prorated among the claimants. Plain was regarded as without brand and grouped and apportioned as Shanghai, Canadian and American plain. Double Fish, Queen and Mixed were not specifically claimed and the total amount received from these brands was prorated among all claimants.

. . . .

NATIONAL CITY BANK OF NEW YORK.

Egyptian	$ 1,997.47
Lotus	25,927.49
Green Battleship	21,486.86
Shanghai Plain	3,125.07
Double Fish, Queen & Mixed	600.43
	$53,137.32

SUMMARY.

Bank of China	$ 12,631.08
Bank of Communications	15,326.06
China & South Sea Bank	105,081.68
Chinese American Bank of Commerce	39,513.22
Banque Franco-Chinoise	24,109.83
National Commercial Bank	21,527.11
Far Eastern Bank	15,564.52
Exchange Bank of China	1,305.97
Bank of Agriculture & Commerce	2,402.83
Agricultural & Industrial Bank of China	800.95
Chung Yuan Bank	74.59
National City Bank of New York	53,137.32
Total	$291,475.16

NOTE: The amount $300,489.86 is drawing interest at the rate of 2% per annum and the total accrued at date of final distribution will be pro rated among all claimants.

R. T. MCDONNELL,
Trustee.

EXHIBIT No. 2.

(Cause 3067—Exhibit 2 (sheet 1).

Tls.30,000.00/100 Tientsin, April 8, 1927.

On Demand for Value Received, I/We Unconditionally Promise to Pay to the Order of the American Overseas Warehouse Company, Inc. at the National City Bank of New York, Tientsin, China, the Principal Sum of Thirty Thousand and 00/100 Tientsin Taels, Together with Interest Thereon from Date at the Rate of 10 Per Cent Per Annum Until the Said Principal is Paid.

The undersigned has deposited with said Company as collateral security for the payment of this and any and every liability or liabilities of the undersigned to said company direct or contingent, due to or to become due, or which may hereafter be contracted or existing, and whether the same may have been or shall be participated in whole or part to others by trust agreement or otherwise, or in any manner acquired by or accruing to said Company whether by agreement with the undersigned or by assignment or by endorsement to it by any one whomsoever, the following property, viz.:

10,000 bags (net 49 lbs. each) Green Battleship Brand Flour @ 3.40..	$34,000.00
10,000 bags (net 49 lbs. each) Red Battleship Brand Flour @ 3.40..	34,000.00
	$68,000.00

together with all other securities in the possession of said Company, belonging to the undersigned or in which the undersigned has an interest, with authority to repledge and/or all of the said goods and/or securities hereby agreeing to deliver to said Company additional securities to its satisfaction upon its demand; also hereby giving the said Company a lien for the amount of all said liabilities of the undersigned to said Company upon all property or securities which now are or may hereafter be pledged with said Company by the undersigned, or in the possession of said Company in which the

undersigned has any interest. On the non-performance of said promise or upon the non-payment of any of said liabilities, or upon the failure of the undersigned forthwith to furnish satisfactory additional security on demand at the option of said Company, this obligation shall become immediately due and payable, and said Company is hereby given full power to collect, sell, assign and deliver the whole of said securities or any part thereof or any substitutes therefor, or additions thereto, through any stock exchange, broker's board, or broker or at private sale without advertisement or notice, the same being hereby expressly waived; or said Company at its option may sell the whole or any part of said securities or property at public sale, upon notice published once in any newspaper printed in the Province of Chihli not less than three (3) days prior to such sale, at which public sale said Company may purchase said securities or property or any part thereof free from any right of redemption on the part of the undersigned, which is hereby expressly waived and released. Upon any such sale, after deducting all costs and expenses of every kind, said Company may apply the residue of the proceeds of such sale as it shall deem proper toward the payment of any one or more or all of the liabilities of the undersigned to said Company whether due or not due, returning the overplus to the undersigned and in the event of sale of such security/ies, if the amount realized be insufficient to pay off this obligation and all interest, costs and charges then accrued, the undersigned agree/s and hereby promises to pay the deficiency then remaining unpaid, on demand of said Company or other holder or owner of this obligation.

The undersigned agrees to pay all expenses of warehousing and preserving the said property and all expenses incurred by the said Company in keeping said property in good condition; to deliver to the Company on the execution of this obligation valid and sufficient fire insurance policies, covering the goods hereby pledged, in the name of the

Company, with authority to the Company, if no such policies are delivered to it, to keep the said goods insured and the expense of said insurance to be a lien on the said goods.

The undersigned hereby authorizes any attorney-at-law in the Province of Chihli or elsewhere at any time after the above sum becomes due to appear for the undersigned in any Court in the Province of Chihli or elsewhere, and to waive the issuing and service of process and confess judgment against the undersigned in favor of the payee or any holder of this note for the amount appearing due and the costs of suit and thereupon to release all errors and waive all rights of appeal and stay of execution. The makers of this note, when more than one, shall be jointly and severally liable hereon. The undersigned further agrees to pay all attorneys' and collection fees, costs of court, publication, sale and expenses of every kind which may be incurred in enforcing payment of this note.

No. 17/1927.

Due 6 weeks—O. K.

THE UNION TRADING CORPORATION, INCORPORATED.

(Sgd.) .....

General Manager.

We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.

THE AMERICAN OVERSEAS WAREHOUSE CO. INC.

(Sgd.) WILLIAM P. HUNT,
Acting Manager.

(Copy)
(Exh. 2, sheet 2.)

No. 3621

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

27 Seymour Road, Tientsin.

GODOWN WARRANT.

Tientsin, April 8, 1927.

Received the under mentioned goods in apparent good condition to be stored for account of National City Bank of New York.

Ten Thousand (10,000) Bags Green Battleship Brand Flour.

Ten Thousand (10,000) Bags Red Battleship Brand Flour.

This warrant covers insurance against Loss on damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of this warrant on the above mentioned goods is M$68,000.00/100 but in case of fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

N. B. Not responsible for loss or damage by Earthquake, Typhoons, Storms, Floods, Effects of Climate and/or other Acts of God.

Responsible only for the delivery of the cargo in the condition received taking no cognizance of the contents of the packages.

All transfer of ownership of cargo to be immediately endorsed on this warrant. All charges against goods to be fully paid at the date of transfer.

All charges to be fully paid on delivery of all merchandise.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Seal) (Sgd.) WILLIAM P. HUNT,
Acting Manager.

EXHIBIT No. 3.

American Overseas Warehouse Co.

(Cause 3067—Exhibit 3.)

THE NATIONAL CITY BANK OF NEW YORK.

In CONSIDERATION OF THE NATIONAL CITY BANK OF NEW YORK (hereinafter referred to as the said Corporation) allowing me/us the undersigned to overdraw my/our account with the said Corporation or to open an overdrawn account with the said Corporation, I/we hereby pledge to the said Corporation as security for the repayment to the said Corporation on demand of all amounts due or which hereafter may become due from me/us to the said Corporation, as well as for all interest on such overdrawn account at the rate or rates charged by the Corporation and all costs and charges, all Stocks, Shares and Securities which I/we may have already deposited with the said Corporation, or which may be in their possession as also all Stocks, Shares and Securities which I/we may hereafter deposit with the said Corporation or which may hereafter come into their possession. AND I/we the undersigned hereby constitute and appoint as my/our Attorney for the purposes hereinafter mentioned the Manager or Agent for the time being in Tientsin of the said Corporation and specially authorize and empower him to fill up and complete any incomplete transfer attached to any of such Stocks, Shares and Securities, and to insert his name or that of any other nominee of the said Corporation therein as transferee of the Shares and Securities enumerated therein, and to sign, or as the case may be, to sign, seal, execute and deliver any such transfer or other document that may be necessary or required for the purpose of completing the title of the said Corporation to any of such Stocks, Shares, and Securities, and register the same in the books of the

Corporation to which the same relates, and obtain fresh scrip for the Shares and Securities enumerated therein in his own name or in that of any other employee of the said Corporation without any reference to or consent of me/us. Also to sell and absolutely dispose of all or any such Stocks, Shares and Securities in such manner as he may think fit without any reference to or consent of me/us. AND I/we hereby agree at the request of such Manager or Agent of the said Corporation to sign, or, as the case may be, to sign, seal, execute and deliver any transfer or other document that may be necessary or required by the said Corporation for the purpose of completing the title of the said Corporation to any of such Stocks, Shares and Securities. AND I/we further authorize the said Corporation to reimburse themselves out of the proceeds of any sale all costs, charges, and expenses incurred by them in transferring and selling all or any of such Stocks, Shares and Securities. AND I/we declare that the said Corporation shall not be responsible for any loss from or through any brokers or others employed in the sale of any of such Stocks, Shares and Securities, or for any loss or depreciation in value of any of such Stocks, Shares and Securities arising from or through any cause whatsoever. AND any deficiency whatsoever and however arising, I/we agree to make good and pay on demand to the said Corporation. AND it is further agreed that the said Corporation shall have a lien on all such Stocks, Shares and Securities or on the proceeds after sale thereof (if sold) as security for or in part payment of any other debt due or liability then incurred or likely to be incurred by me/us to the said Corporation. AND I/we further authorize the said Corporation to collect all dividends and bonuses payable or hereafter paid in respect of any of such Stocks, Shares and Securities, and engage to sign all such further documents as may be necessary effectually to vest in the said Corporation the property in the said Stocks, Shares and Securities, and

the dividends and bonuses payable in respect thereof [16] or to the effect the selling or transferring of the same. AND I/we further agree at all times to keep up the value of such Stocks, Shares and Securities. And in the event of a temporary or permanent depreciation in value of any of such Stocks, Shares and Securities at the request of the said Corporation or the Manager or Agent for the time being either to pay to the said Corporation in money the difference between the market value of any of such Stocks, Shares and Securities, on the date when they were deposited with or came into the possession of the said Corporation and on the date when such payment as aforesaid may be made, or to deposit with the said Corporation other approved Stocks, Shares and Securities, equivalent in value to the market deterioration. AND in the event of my/our failing to comply with such request I/we hereby authorize the said Corporation or the Manager or Agent for the time being to immediately exercise all or any of the powers hereby conferred upon them and him. AND I/we lastly declare that the said Corporation or the Manager or Agent for the time being shall not be answerable or responsible for any damage or depreciation which any of such Stocks, Shares and Securities may suffer whilst in their possession under this Agreement.

IN WITNESS WHEREOF I/we have hereunto set my/our hand and seal this 2d day of September, one thousand nine hundred and twenty-six.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.
(Sgd.) C. H. CORNISH, (Seal)
General Manager.

Signed, sealed and delivered by....., in the presence of.....,
(Signed) .....

We quote also, but for purpose only of readily referring to the same, the paper that is entitled Assignment of Errors and is printed in the Transcript of Record at Pages 91-4, omitting therefrom only the usual opening and closing and the prayer.

ASSIGNMENT OF ERRORS. 1. The Court erred in finding and deciding in its decision and judgment filed July 16th, 1928, that the National City Bank, of New York was entitled to participate in the proceeds of the flour held by the defendant as assignee of the American Overseas Warehouse Co., Inc., in respect of Warrant No 3621, dated April 8th, 1927, held by the National City Bank of New York and purporting to have been issued by the American Overseas Warehouse Company, Incorporated, in respect of 10,000 bags of Green Battleship flour and 10,000 bags of Red Battleship flour.

2. The Court erred in not holding and deciding that warrant No. 3621 aforesaid purporting to have been issued in respect of certain flour, having been issued by the American Overseas Warehouse Company, Incorporated, in support of and subsequent to an assignment to the National City Bank of New York of the benefit of the alleged pledge of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated the 8th Day of April, 1927, was of no effect.

3. The Court erred in not holding and deciding that the National City Bank being already assignee of the benefit of an alleged pledge of the flour purporting to be covered by warrant No. 3621 aforesaid, the said warrant was taken by the Bank with notice that the Warehouse Com-

pany only purported to have a special property in the said flour as pledgee, and was not in a position to issue in respect thereof a negotiable receipt such as the said warrant constituted.

4. The Court erred in not holding and deciding that the effect of godown warrant No. 3621 aforesaid in the hands of the National City Bank of New York was limited to the effect of the assignment of the benefit of an alleged pledge in respect of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated on the same day, namely, April 8th, 1927, but prior to the issue of said warrant.

5. The Court erred in not holding and deciding that the transactions between the Union Trading Corporation and the American Overseas Warehouse Company, Incorporated, and the assignments thereof to the National City Bank of New York were not transactions in the ordinary course of business of the American Overseas Warehouse Company, Incorporated, as warehousemen and could not be made the subject of godown warrants.

6. The Court erred in not finding and deciding that the position of the American Overseas Warehouse Company, Incorporated, in respect of the flour purporting to be covered by warrant No. 3621 aforesaid, could not be in a better position as pledgee than if purporting to be owner thereof, and that since a warehouseman cannot issue a valid warehouse receipt in respect of his own property the Warehouse Company could not issue a valid negotiable receipt in respect of the flour of which it was only an alleged pledgee.

7. The Court erred in not finding and deciding that a warehouseman cannot issue a valid warehouseman's receipt by way of security for his own indebtedness and that in consequence godown warrant No. 3621 aforesaid held by the National City Bank of New York invalid and of no effect.

8. The Court erred in finding and deciding that the legal effect of the transaction between the American Overseas Warehouse Company, Incorporated, and the National City Bank, of New York was that the Bank had deposited with the American Overseas Warehouse Company, Incorporated, the flour purporting to be covered by godown warrant No. 3621 aforesaid.

III

BRIEF OF THE ARGUMENT

The American Overseas Warehouse Company, Incorporated, conducted a public warehouse. A public warehouse is a place that is held out to the public as being one where any member of the public, who is willing to pay the regular charges, may store his goods and then sell or pledge them by transferring the receipt given him by the keeper or manager.

> *Security Warehousing Co v Hand,* CCA 2, 143 F 32, 40; affirmed, 206 US 415
>
> *Act of Congress,* 39 St L 486, as amended 42 St L 1282, an Act to make uniform the law of warehouse receipts in the District of Columbia. This Act, Sec 58, states that a "warehouseman", as the term is used in the Act, is "a person lawfully engaged in the business of storing goods for profit".

Storage of goods is the sole business. Members of the public entrust the warehouseman with their goods for the single purpose of safe custody. The warehouseman is not money-lender or banker. Any one who deals with a warehouseman on documents that in themselves show his irregularity, arising necessarily from his doing business for which he is unauthorized, has full notice that title attempted to be transferred by the warehouseman may be questioned and may be inferior or even void.

It is also essential to the warehouse business that possession of the goods have its record certain and clear. Title cannot be transferred through the warehouseman in usual and authorized course of business, and in extraordinary case of attempting to do so the

law requires, as the public knows, either that there be outright dispossession of the goods from the warehouseman into the possession of a third party or the making of public record and giving of due and effective notice to those entitled to notice.

> "Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession. The pledgor must dispossess himself openly, completely, unequivocally, and "without deceptive combinations which lead third persons into error as to the real possessor of the thing". *Security Warehousing Co v Hand,* CCA 2, 143 F 32, 41; affirmed, 206 US 415

One further premise, though general, is essential. The jurisdiction granted the United States by treaty with China and so greatly appreciated and strongly supported by American business men residing and doing business in China involves obligation upon our part to observe the laws of the United States suitable to be applied in China. And in doing business with the Chinese Banks, plaintiffs in this action, the American Overseas Warehouse Company, Incorporated, and the National City Bank of New York as claiming title from the warehouse company had the greater obligation both in the substantive law and the procedural.

POINT ONE: THE JUDGMENT IS NOT RESPONSIVE TO THE PLEADINGS, AND THEREFORE, IN THIS ACTION OF DEBT IN UNITED STATES JURISDICTION IN CHINA, REVERSIBLE.

The common law dominates in United States jurisdiction in China. Probably no United States jurisdiction has so little statutory law and so much common law as that of China. At common law the action of debt is one of the oldest and throughout the centuries most frequently used. Debt, as an action, firmly and permanently conforms to rights and obligations in substantive law.

> "It lay generally wherever an act of the plaintiff had benefitted the defendant in some certain sum of money which the defendant ought to pay; the duty creates the debt."
>
> Debt was not sustainable "unless the demand was for a sum certain, or for a pecuniary demand which could be readily reduced by reference or computation to a certainty."
>
> *Perry, Common Law Pleading,* 52

> "It is manifest that a witness oath, which disposes of a case by the simple fact that it is sworn, is not a satisfactory mode of proof. A written admission of debt produced in court, and sufficiently identified as issuing from the defendant, is obviously much better. . . . But a writing proved to be the defendant's could not be contradicted. For if a man said he was bound, he was bound."
>
> *Holmes, The Common Law,* 261

It is the requirement of "a writing proved to be the defendant's" wherein defendant "said he was bound" that appears to us to have been complied with

in the pleadings. But to that requirement, we are obliged to urge, the judgment does not respond.

> "On this subject this court is satisfied that the law of the action of debt is the same now that it has been for centuries past. That the judgment must be responsive to the writ, and must, therefore, either be given for the whole sum demanded, or exhibit the cause why it is given for less sum. Otherwise non constat, but the difference still remains due."
>
> *Hughes v Union Ins Co of Baltimore,* 21 US 294
>
> *United States v Colt,* (Opinion by Mr. Justice Washington) Fed Cas No 14839, reprinted at 5 L ed 727

In this case tried in China the answer of the Assignee of the Warehouse Company contained a cross-claim on which the judgment was supposed to rest. The cross-claim incorporated with itself by reference the "godown warrants or trust receipts" which are Defendant's Exhibits Nos. 1, 2 and 3, printed in the Transcript at Pages 15 to 28. The cross-claim also admits and relies upon as necessary to judgment Plaintiffs' Exhibit C, the proposed distribution of proceeds from sale of flour.

The judgment, supra 10 and Tr 50, reads, "allotting to the National City Bank of New York $6,600.90, or $3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee". Turning to the proposed distribution, Plaintiffs' Exhibit C, Tr 7, it is seen that the assignee listed no flour of "Red Battleship" brand. Therefore, in respect of the $3,300.45 the judgment is not in accord with the writ-

ing proffered by the cross-claimant in proof of his claim or debt, and the judgment is reversible for the error.

In other respects the judgment, on the other hand, may be said to aid the pleading of the cross-claim, this pleading being, we are obliged to note, somewhat inexpert. For example, the pleading of the cross-claim is uncertain and unintelligible in important respects, and, in an action at law, where it relies upon writings for affirmative relief, it prays only that plaintiffs' complaint be dismissed, with costs. What then of the remainder of the fund? But plaintiffs did not urge these particular defects at the trial. The defects they urged were to the writings themselves. The writings being insufficient and worthless in view of the law, the judgment was without basis so far as it could avail the cross-claimant. The argument on these matters we make under Point Two.

Under Point Two the argument, in most part, is that of Mr. Kent.

POINT TWO: THE "GODOWN WARRANTS OR TRUST RECEIPTS" HELD BY THE NATIONAL CITY BANK OF NEW YORK WERE NOT EQUIVALENT IN LAW TO THE WAREHOUSE RECEIPTS HELD BY THE CHINESE BANKS.

The use of the phrase "godown warrants or trust receipts" by the defendant implied that the terms "Godown Warrant" and "Trust Receipt" are interchangeable. But it is clear that a very wide difference exists between them. In order to appreciate the difference it is necessary to refer briefly to the circumstances in which they were issued respectively.

The principal client, although not the only client of the Warehouse Company, was a Chinese concern known as the Union Trading Corporation. This Company failed in July, 1927, involving the Warehouse Company which had been its chief instrument in respect of a series of extensive frauds. It was the custom of the Union Trading Corporation to store, or to purport to store, with the Warehouse Company flour and other merchandise, export and import, and to borrow money of the Chinese Banks on the security of the relative godown warrants. It was also its custom to borrow money from the Warehouse Company and to secure it, or to purport to secure it, by deposit or alleged deposit of goods by way of collateral security. In the former case a document of title was issued the signer of which, the Warehouse Company,

> "was estopped or not permitted to deny the existence of the facts represented in or by them".
>
> *Hale v Milwaukee Dock Co,* 29 Wis 482, 9 Am Rep 603

In the latter case at most the warehouse company acquired a special property in the goods as pledgee, while its assignee, without transfer of possession of the goods, could only look to the warehouse company as trustee. In consequence, the position of the National City Bank, which was that of assignee of the Warehouse Company, could only be that of the holder of a trust receipt of which the only security as against third parties was the good faith of the Warehouse Company.

This position becomes abundantly clear if the document be analyzed, when it will be found to fall into three parts:

(a) A promissory note from the Union Trading Corporation to the Warehouse Company;

(b) A deposit or purported deposit of goods by the Union Trading Corporation with the Warehouse Company as collateral security; and

(c) An indorsement by the Warehouse Company to the National City Bank in the following terms:

> "We have received the goods mentioned in this instrument and will hold same to the order of the National City Bank of New York and we hereby transfer all our rights under this instrument to the National City Bank of New York."

This latter, if further analyzed, amounts to a certificate that the goods have been received and an undertaking to hold them to the order of the Bank. This is a trust receipt and it is submitted, with respect, that no amount of reasoning can make it anything else.

There are also two reasons in law why this document cannot be regarded as a godown warrant.

(a) A document to be a warrant must include an indication of contract of storage.

Sinsheimer v Whitely, 111 Cal 378, 52 Am St Rep 192, 43 Pac 1109

In this case there was nothing in the indorsement to show a contract of storage between the Warehouse Company and the National City Bank of New York. There was in fact no liability on the Bank to pay storage. Nor can the obligation of the Union Trading Corporation to pay storage be considered to fulfil this want. In the first place the National City Bank, not being assignee of the Union Trading Corporation, but of the Warehouse Company, is not affected by the obligation of the Union Trading Corporation; secondly, the primary object and effect of the transaction was a pledge to the Warehouse Company and not a contract of storage. The fact that a pledgee expects to receive rent for the space occupied by bulky goods does not transform a bailment by way of pledge into a bailment for storage purposes, which is an entirely different form of contract.

(b) The facts show that the Warehouse Company was doing two forms of business. It was doing business as a warehouseman. It was also doing finance business, lending money to clients. Such businesses are distinct. And since the authority is clear that a man cannot constitute himself a warehouse of his own goods, it follows as a matter of principle that a warehouseman cannot in respect of his business transactions outside warehousing, fortify the position of his creditors by means of warehouse warrants. The headnote of a leading authority is as follows:

> "A warehouseman is one who carries on the business of receiving and keeping goods in storage for compensation. Hence one cannot be a warehouseman of his own goods."
>
> *Tradesmen's National Bank v Kent Manufacturing Co,* 186 Pa 556, 65 Am St Rep. 876

In the light of the foregoing, it is submitted with respectful confidence that the Court should have decided that the documents held by the National City Bank of New York did not constitute warehouse warrants. It then follows that they were trust receipts, and with the conclusion resulting without further argument that the Chinese Banks should prevail. The Chinese Banks had legal title to the goods, the National City Bank had not.

> "This belongs to the class of cases, unfortunately too common, where one of two entirely innocent parties must suffer from the fraud of a third. The decision must therefore follow the better title by strict law."
>
> *Tradesmen's National Bank v Kent Manufacturing Co,* 186 Pa 556, 65 Am St Rep 876

To discuss the position further would appear a work of supererogation. On the other hand, since the Chinese Banks were and are in a position to defeat the claim of the National City Bank on two other grounds, it seems a duty to submit further argument.

(a) It has been demonstrated that the foundation of the claim on behalf of the National City Bank was the transaction between the Union Trading Corporation and the National City Bank. This transaction, an

alleged deposit by way of collateral security, could, at most, be assigned the status of a pledge. For its validity, therefore, it was necessary to show the elements of pledge, the symbol of which in Roman law was the closed fist, emblematical of the possession of a definite identifiable thing. These requirements were adopted by the common law. It was clear, however, that there was nothing to distinguish one parcel of flour from another. If ever the incidents of pledge existed, they had long since disappeared.

Fourth Street Nat Bank v Milbourne Mills Co's Trustees, 172 F 177, 181-4

It is only desired to add in this connection that although this case was in bankruptcy, the principle is the same in the case of a voluntary assignment. On page 183 of the report, the judgment in

Girard Trust Company v Mellor, 156 Pa 579, 27 Atl 662

delivered by Chief Justice Sterrett is quoted as follows:

> "As a general rule in this state a debtor cannot, as against his creditors, assign personal property as security etc., and at the same time retain the possession thereof as theretofore. Possession must accompany the transfer as an essential part thereof. If the property is permitted to remain in the exclusive possession and control of the assignor, the transaction, while good as against himself, is a constructive or legal fraud upon his creditors, and may be so treated by them. To hold that exclusive possession may be retained by the debtor provided he agrees to hold as trustee until the same is demanded by his creditors or until default is made, would be to permit that to be done secretly and by indirection which the law condemns when done directly and openly. This principle is

so firmly grounded in our jurisprudence that no court of equity should lend its aid in the enforcement of a transaction which is not in harmony with the settled law on that subject. We think, the transaction in question clearly belongs to that class.

This case is particularly significant, in that the creditors were represented by an assignee by deed of voluntary assignment, who is supposed to stand squarely in the shoes of the assignor, but as against whom the attempted pledge was nevertheless declared void."

Here we have the American Overseas Warehouse Company in its capacity of warehouseman liable on its warrants for flour, and seeking for the benefit of its own private creditor to retain a portion of that flour.

(b) *"Nemo plus juris ad alium transferre potest quam ipse haberet."* A cestui que trust cannot be in a better position than his trustee. The National City Bank could not have been in a better position than the Warehouse Company.

If the Warehouse Company was pledgee, it could not be in a better position than if it were owner. It is pertinent to inquire therefore what would have been the position of the Warehouse Company had it been the owner.

In the first place it is to be noted that sacks of flour of the same brand not being distinguishable fall within the definition of fungibles in Article 58 of the Warehouse Receipts Act already cited. The law

Act of Congress, Aug 11, 1916, 39 St L 486, as amended Feb 23, 1923, 42 St L 1282,

in regard to title in the matter of fungibles is summarized in

27 *Ruling Case Law* 979 Sec 36,

under title "Warehouses," as follows:

> "When grain or other fungible goods are placed in warehouse and are stored in bulk under such circumstances that the transaction is classed as a bailment, not as a sale, the various depositors become tenants in common of the mass. This is so from the necessity of the case, because as soon as the goods are intermingled, each person's portion loses its identity and can no longer be distinguished or separated from the common mass. He continues as a tenant in common, not only while his grain is in the common store, but as long as any grain is so stored, and if the owner of the warehouse puts his own grain into the mass, he becomes as to such grain a tenant in common of the entire body of grain with the other owners. But when a deficiency arises in the grain, any which is still owned by the warehouseman is appropriated for the benefit of the holders of other warehouse receipts."

The authorities quoted in support are the cases of *Hall v Pillsbury,* 43 Minn 33, 19 Am St Rep 209, 44 N W 673, 7 L R A 529, and *Drudge v Leiter,* 18 Ind App 694, 63 Am St Rep 359, 49 N E 34

These cases are entirely in point with the present case and since they are cited in the modern publication Ruling Case Law, their validity may be accepted. In the latter connection it may be observed that the principle of the old common law of bailments have been developed in a series of closely reasoned decisions in States whose vast grain products have demanded adaptation. The obvious soundness of such judg-

ments, of which those just cited are notable examples, have appealed to the common sense of the American business and legal world and have stood the test of time.

Applying these principles it is clear that the National City Bank of New York could only come in after holders of warrants had been satisfied.

Again the unavoidable consequences of the foregoing analysis of the documents and the weight of authority produced on behalf of the Chinese Banks, the following points were made on behalf of the Assignee, representing the claim of the National City Bank.

(a) It was contended that the transactions between the Union Trading Corporation and the Warehouse Company and between the Warehouse Company and the National City Bank were simultaneous. It therefore was argued that the National City Bank was the direct mortgagee of the owner of the flour, and the Bank therefore had a title as mortgagee under a chattel mortgage.

With great respect it is submitted that such a contention is fantastic. In the first place there was no evidence to support such a proposition. The defendant called no witness and based his position entirely on the construction of the documents. In any case he must have pursued this course since evidence would not have been admissible to modify the written word. As submitted the documents showed clearly the course of events to have been: promissory notes accompanied

by alleged deposit of goods with the Warehouse Company for collateral security, followed by endorsement to the Bank. The terms of the indorsement negative such a pretension as is put forward on behalf of the bank since it reads the Warehouse Company had received the goods, held them to order, and gave the Bank the benefit of the within written instrument. If the transaction between the Union Trading Corporation and the Warehouse Company had not been complete, such a declaration and undertaking would have been without foundation and therefore of no effect.

Even if there had been evidence to suggest that the transactions had been as nearly as possible simultaneous, which there was not, it would still have been impossible to argue that the Warehouse Company had not been constituted the pledgee. The length of time was immaterial. At the moment the Union Trading Corporation signed the document the Warehouse Company became pledgee as the depositee of goods by way of collateral security. Directly that relationship was established the legal consequences followed and formed the foundation of the indorsement which must be read in subordination thereto.

As regards the contention that a chattel mortgage had been effected, it is clear on the facts that this was not the case.

> "Where title to property is not presently transferred, but possession only is given, with power to sell upon default in the performance of a condition, the transaction is a pledge and not a mortgage."
>
> 21 *Ruling Case Law* 632 Sec 2, title Pledge

In this case there purported to be deposit by way of collateral security, and subsequently effective words of pledge were employed in favour of the Warehouse Company. This established a pledge. But if it could be construed as a chattel mortgage, the

> "assignment does not pass the legal estate to the assignee."
>
> 5 *Ruling Case Law* 441 Sec 74, title Chattel Mortgages

Again even if the theory of a chattel mortgage could have been supported on the facts, such alleged chattel mortgage would not have been valid any more than a pledge since particularity of object is called for. The goods comprised in the mortgage must be separated or otherwise distinguishable from other goods not subject to the mortgage.

> 5 *Ruling Case Law* 422, 426, Sec 53 and 58, title Chattel Mortgages

Since, in this case no flour could be distinguished as the property of or pledged to any person, it follows that the identity of the subject matter of the alleged chattel mortgage had been lost which necessarily caused the alleged chattel mortgage, even if it could be otherwise substantiated, to fail.

(b) It was argued that if the Chinese Banks had been free to contend that a valid pledge had not existed, owing to lack of identity of the subject matter of the pledge, it would have been equally open to the National City Bank to attack the warrant holders on the same lines. This, however, was not possible.

Whereas the law, if called upon to sustain a pledge, demands that all the incidents of pledge be present, and none of them were present in this case, the holder of the negotiable receipt of a warehouseman is under no obligation to identify the goods covered thereby. The warehouseman is in a sense a public servant. It is assumed that his honesty is above question. He resents any doubt of this kind. The holder of the warrant is entitled to delivery on presentation, and it is for the warehouseman to identify and deliver the identical goods, or, if fungibles, goods of the kind in the quantity called for.

(c) Defendant appears further to have argued that the title of the National City Bank was as much a legal title as the title of the Chinese Banks, that the legal title to goods did not pass to the warehouseman in respect of the goods stored with him and made the subject of warehouseman's warrants. Therefore he could not give legal title to holders of such warrants. And on that it could be suggested that the title in the holder of the warehouseman's receipt was no better than the title of the National City Bank as indorsee of the pledgee.

With great respect, it is submitted, this entirely overlooks the fundamental difference in principle between the two transactions.

In the matter of the document held by the National City Bank the Warehouse Company had a special property in the goods which it agreed to hold in trust for the Bank. That cannot by any possibility be described as a legal title in the Bank. The Chinese

Banks, however, held warehouse receipts which were admitted to be documents of title. In their position the owner of the goods deposited them with the Warehouse Company for storage purposes only and received a negotiable receipt either in his favour or in favour of the person to whom the goods were intended to be negotiated for purposes of security.

On all authority this constitutes a legal title. But the foundation of the title in the latter case is estoppel. This is clearly defined by Chief Justice Dixon of Wisconsin, in the case of

Hale v Milwaukee Dock Co, 29 Wis 482, 9 Am Rep 603

already cited:

> "The receipt of a warehouseman or wharfinger, and the receipt of bill of lading of a common carrier, are contracts of precisely the same general nature and effect, and should obviously be governed by the same rules and principles as to the application of the doctrine of estoppel or negotiability, which, with respect to such contracts, mean one and the same thing. They are or may be said to be negotiable or conclusive, in the hands of a bona fide assignee or holder for value, so far as the party executing them, warehouseman or carrier, has made, or is bound by, the representations contained in them. They are negotiable or conclusive and valid in the hands of such a holder, because the signer, or party by whom they are executed, is estopped, or not permitted to deny the existence of the facts represented in or by them, and which are presumed to have been within his knowledge at the time of their execution."

(d) Argument opposed to the Chinese Banks may also be that the language of the indorsement on the

document held by the National City Bank was indistinguishable in effect from the language in the godown warrants. It is submitted with great respect that it is quite impossible to suggest that legal consequences flow from language taken apart from its context and without reference either to the circumstances or to the legal position of the person who made himself responsible by using the words employed. The words were necessarily impressed by the capacity of the person using them, and in the case of the National City Bank document, the Warehouse Company, who employed the words, used them in respect of its special property as pledgee and in its private capacity to secure its own indebtedness to the Bank as opposed to its public capacity as a Warehouseman, which has already been demonstrated to be not recognized in law.

(e) Against the Chinese Banks it could be further argued that the warrant holders could be attacked on the ground that the flour had never been there. This may be doubted in view of the legal position stated in Sub-paragraph (c) above. However, the attack was not made and there is no issue in this connection. Yet it may be well to point out that the legal title was necessarily to be found somewhere amongst the warrants, and it must have been that many of the warrants were properly issued. The fact that all warrant holders agreed not to thresh out the question of relative validity as between the warrants but to pool the proceeds, did not provide a good foundation for an argument that the warrants could be regarded in the same weak position as the documents held by the

National City Bank. There was flour in the godown of several brands amounting to 91,666 bags. This flour must have been covered by some of the warrants, and therefore a legal title could always be established in favour of certain warrant holders. If the latter agreed *ex gratia* to share the proceeds with their friends that was their own affair.

The godown warrants on which Defendant relied merely accompanied and supported in effect the document of pledge from the Union Trading Corporation to the Warehouse Company, the benefit of which was endorsed over to the National City Bank. It follows, therefore, that the accompanying godown warrants were accepted by the National City Bank with full notice of the capacity in which the Warehouse Company assigned its interest, and therefore the godown warrant in the hands of the National City Bank could have had no greater value than the legal relationship between the several parties attached to the main documents warranted.

The true explanation of the position of the National City Bank would appear to be that it preferred to do its business with an American corporation under the management of American citizens. It was not concerned with the use made by that corporation of any loans which might be made by the Bank, so long as it considered itself adequately secured. The real foundation of the position of the National City Bank

was its confidence in the Warehouse Company, and it seems clear that it expected to find itself in an entirely favourable and even preferential position. Unfortunately for the Bank, either the Warehouse Company never received the goods on pledge or it delivered them to the owner or at the request of the owner to other persons, or it confused them with other goods so that they became indistinguishable. In other words the Warehouse Company and its management on whose integrity the National City Bank relied proved itself a fraudulent trustee.

In consequence the principles of Law governing the situation have to be applied with the following results:

(a) The Chinese Banks were entitled to be recognized, it is respectfully submitted, as having the superior title.

(b) In form the documents held by the National City Bank were trust receipts in respect of property alleged to have been pledged. They not only failed to satisfy the legal requirements of godown warrants or warehouse receipts, but they also failed in that they were not proved to have the incidents of pledge.

(c) Apart from these failures, lien must always yield to legal title; and since an assignee cannot be in a better position than his assignor, the National City Bank could only participate in the proceeds of sale of the flour in the godown after warrant holders had been satisfied. As there was not sufficient flour to satisfy the warrant holders, it follows that the National City Bank should have been, by reason of law, entirely excluded from participation.

IV

CONCLUSION

The judgment is reviewable for error apparent on the face of the record.

The warehouse receipts and assignee's plan of distribution, and the cross-claimant's "godown warrants and trust receipts" were, by rule of common law in action of debt, parts of the pleadings. The judgment is not responsive, and, therefore, at common law, reversible.

The judgment is specially not responsive in that the "godown warrants and trust receipts" pleaded by cross-claimant as equivalent in law to the warehouse receipts pleaded by claimant and admitted by cross-claimant to be valid and in effect were not so equivalent in law. To hold them equivalent was reversible error.

Wherefore cross-appellants respectfully appeal to the Honorable the Circuit Court of Appeals to reverse said judgment and to remand the cause with directions to enter judgment for cross-appellants, with their costs.

Dated, San Francisco,
May 15, 1929.

Respectfully submitted,

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No. 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

vs.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants.

BRIEF FOR APPELLANT.

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Appellees and Cross-Appellants.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal and cross-appeal from a decree of the United States Court for China.

R. T. McDonnell, defendant below anad appellant and cross-appellee here, is assignee of American Overseas Warehouse Company, Inc., an insolvent American corporation, which formerly conducted a warehouse (godown)

at Tientsin. On the failure of the Warehouse Company some 91,666 bags of flour were in its warehouse, and came into the hands of defendant as assignee. The flour was in one common unsegregated mass, without marks except the brands on the bags, and with nothing to indicate that any part of it was owned by any particular person (Tr. p. 55).

Against the 91,666 bags of flour on hand there were outstanding claims for 1,157,500 bags. The plaintiffs below, the appellees and cross-appellants in this court, held so-called "godown warrants" or warehouse receipts for 996,500 bags. The National City Bank of New York, as assignee of a pledge of flour made by Union Trading Corporation to the Warehouse Company, and by the Warehouse Company assigned to the Bank, held pledge agreements calling for 161,000 bags. To one of these pledge agreements was attached a "godown warrant" (Exh. 2, Sheet 2, Tr. pp. 23-24) in the form of the warrants held by plaintiffs; the other five had no warrants. All six agreements carried the written acknowledgment of the Warehouse Company that it had received the pledged flour and would hold the same subject to the order of the Bank (Tr. p. 19).

Inasmuch as the case turns on the ruling of the trial court that the pledge agreements, notwithstanding the Warehouse Company's endorsement thereon, "were not the legal equivalent of godown receipts" (Tr. p. 50), we will later more particularly describe these agreements.

By consent of the parties, defendant, as assignee, sold the flour on hand, realizing therefor the sum of $300,489.86*

(*All amounts of money mentioned in this brief are in Tientsin Currency, a dollar of which is equal to approximately forty-seven cents in United States currency.)

(Tr. p. 3). He then issued a plan for the ratable distribution of this amount among all the receipt-holders, in proportion to the number of bags of flour of the various brands called for by their receipts (Exh. "C," Tr. pp. 7-11). This plan included an allotment to The National City Bank of its ratable share of $53,137.32 (Tr. pp. 10-11).

Plaintiffs, as holders of godown receipts, brought this suit to prevent defendant from allotting anything to The National City Bank.

The trial court decided that the Bank should participate ratably with plaintiffs in the fund in the hands of defendant as assignee, to the extent of the flour covered by the one agreement, on which a formal godown warrant had been issued to it by the Warehouse Company. With respect to flour covered by the remaining five agreements, the court decided that the Bank had no right of participation. The court accordingly reduced the allotment made by defendant in favor of the Bank from $53,137.32 to $6600.90 (or to $3300.45, depending on a determination as to whether any flour of the Red Battleship brand, one of the brands covered by the Bank's godown warrant, had come into the possession of defendant as assignee) (Tr. pp. 50-51). From this decree defendant has appealed and plaintiffs have taken a cross-appeal.

In its decision, the court applied a different rule to plaintiffs than to the Bank. It allowed plaintiffs to participate ratably in the fund held by defendant without showing that any of the flour, from the sale of which the money came, was the identical flour against which their receipts were issued. But as to the Bank, the court, while conceding the validity of the pledge, decided that the

pledge was not effective except against the identical flour originally delivered in pledge, and gave the Bank no right of ratable participation in the proceeds of the indistinguishable mass. The decision below is, in other words, that while the wrongful intermingling by a warehouse company of flour of different persons and its misappropriation of part of the mass would not affect the rights of the ordinary receipt-holder to share ratably in what was left, still such intermingling and misappropriation would destroy the rights of a pledgee, notwithstanding that the pledge was in its inception valid.

This ruling presents the main question on the appeal. We will discuss in a separate brief the contentions which plaintiffs may make on the cross-appeal.

THE FACTS.

The "godown receipts" of plaintiffs are in the form of which Exhibit "B" (Tr. pp. 6-7) is a specimen.

The six documents, or pledge agreements, held by The National City Bank are in the same form as Exhibit 1 (Tr. pp. 15-19). Each of them contains the promise of the Trading Company to repay a specified sum to the Warehouse Company; recites the delivery in pledge of specified bags of flour to the Warehouse Company as security for the loan, and confers the broadest powers on the Warehouse Company as pledgee (Tr. pp. 16-18). Contemporaneously with each pledge, the Warehouse Company delivered the pledge agreement to The National City Bank with the following endorsement (Tr. p. 19):

"We have received the goods mentioned in this instrument and will hold same to the order of The National City Bank of New York and we hereby transfer all our rights under this instrument to The National City Bank of New York.

The American Overseas Warehouse Co., Inc.,
(Sgd.) C. H. Cornish,
General Manager."

In one of the six cases—the one with respect to which the trial court held the Bank entitled to participate ratably with plaintiffs in the proceeds of the flour—the Warehouse Company, as above stated, also issued a godown warrant in favor of the Bank, covering the pledged flour (Exh. 2, Sheet 2, Tr. pp. 23-24).

THE QUESTIONS INVOLVED.

Paragraphs 1 to 8 of the complaint contain formal allegations identifying the plaintiffs; set forth the appointment of defendant as assignee of the Warehouse Company; allege that plaintiffs hold receipts for 996,500 bags of flour; allege the shortage, the sale of the flour by defendant as assignee and the making of his proposed plan of distribution, including the allotment of $53,137.32 to The National City Bank (Tr. pp. 2 and 3). Paragraph 9 of the complaint is as follows (Tr. pp. 3-4):

"The plaintiffs deny that The National City Bank of New York is entitled to the said sum of $53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum should be distributed amongst such of their number as hold warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant."

The complaint concludes with a prayer that the whole sum held by defendant be distributed among plaintiffs (Tr. p. 4).

The answer (Tr. pp. 12-13) admits paragraphs 1 to 8 of the complaint. Answering paragraph 9 it avers (Tr. p. 13):

> "The defendant denies the allegations contained in paragraph 9 of the plaintiffs' complaint, and alleges that The National City Bank of New York is the owner and holder of six certain godown warrants or trust receipts issued to said Bank by the said American Overseas Warehouse Company, Inc., which call collectively for the delivery of 161,000 bags of flour of various brands, and therefore said Bank is entitled to participate *pro rata* in the distribution referred to in plaintiffs' complaint."

The reply admits that The National City Bank holds documents bearing the endorsement of the Warehouse Company in the form already quoted (Tr. p. 14), but denies:

> *a.* "* * * that the goods were ever received by the said Warehouse Company as alleged in the said endorsement" (Tr. pp. 14-15);
>
> *b.* "* * * that if any of the said goods were received by the said Warehouse Company, they were received under such conditions as constituted a valid pledge thereof" (Tr. p. 15);
>
> *c.* "* * * that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said Company ceased to do business and from which date the assignment by the said Company to the defendant as assignee operated" (Tr. p. 15).

The trial court decided against plaintiffs with reference to points (a) and (b). It found that the flour mentioned in the documents held by The National City Bank had been delivered to the Warehouse Company in pledge, and also held the documents sufficient in form to constitute a valid pledge of the flour by the Trading Company to the Warehouse Company (Tr. pp. 37-38).

The decision denying the Bank's right of ratable participation (except as to the one agreement on which a godown warrant had been issued, Exh. 2, Tr. pp. 23-24) was on the sole ground, already mentioned as presenting the main question on the appeal, that the pledge could only be effective against the identical flour which had been delivered in pledge (Tr. pp. 38-40).

ASSIGNMENT OF ERRORS.

(Tr. pp. 66-68.)

1. That the United States Court for China erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and The National City Bank of New York was that of pledgor and pledgee (Decision and Judgment, pages 6 to 9, inclusive).

2. That the United States Court for China erred in holding and deciding that The National City Bank of New York, having left with the American Overseas Warehouse Company, Inc., as bailee, certain fungible merchandise, was entitled to receive that particular merchandise only and that after a commingling of such particular merchan-

dise with other merchandise of a like kind, the said National City Bank of New York could not participate *pro rata* in the commingled property.

3. That the United States Court for China erred in holding and deciding that The National City Bank of New York could not successfully claim any merchandise of a fungible nature left by it with the American Overseas Warehouse Company as bailee, without proving by competent evidence that the actual merchandise so left with the said American Overseas Warehouse Company was in the possession of the assignee of that Company at the time he took over as such assignee.

4. That the United States Court for China erred in holding and deciding that all of the transactions between the American Overseas Warehouse Company and The National City Bank of New York similar to the one illustrated by Exhibit 1, do not as a matter of law, place The National City Bank of New York in the position of a holder of a warehouse receipt.

5. That the United States Court for China erred in ordering the defendant to revise and readjust his proposal for the distribution of the proceeds in his hands from the sale of the flour found in the warehouses of the American Overseas Warehouse Company, Inc., when the same were taken possession of by the defendant as assignee.

6. That the United States Court for China erred in ordering the defendant not to recognize the claim of The National City Bank of New York as being entitled to participate *pro rata* in the proceeds from the sale of said flour with the plaintiffs.

7. That the United States Court for China erred in not approving the scheme of distribution proposed by the defendant.

8. That the United States Court for China erred in denying defendant's motion for a new trial.

ARGUMENT.

THE NATIONAL CITY BANK, AS ASSIGNEE OF A VALID PLEDGE MADE BY THE TRADING COMPANY TO THE WAREHOUSE COMPANY, AND AS HOLDER OF THE WAREHOUSE COMPANY'S RECEIPTS EVIDENCING THE DEPOSIT OF THE FLOUR SUBJECT TO THE PLEDGE, IS ENTITLED TO PARTICIPATE RATABLY WITH THE OTHER RECEIPT-HOLDERS IN THE DISTRIBUTION OF THE PROCEEDS OF THE SALE OF THE FLOUR.

First: The pledge of The National City Bank was not extinguished by any wrongful acts of the Warehouse Company in intermingling the pledged flour with other flour and misappropriating part of the mass.

So far as concerned the rights of plaintiffs as holders of godown warrants, the trial court applied the general rule that where goods, either by the consent of all concerned or wrongfully by a depositary, are so intermingled as to be indistinguishable, the holders are tenants in common of the mass, and if a part of the mingled property is lost or is misappropriated by the depositary, all the owners bear the loss *pro rata*. This general proposition is not in dispute and is well settled. See:

Dows v. Ekstrone (C. C. Minn.) 3 Fed. 19;

Ramsey v. Rodenburg, 72 Colo. 567, 212 Pac. 820, 821;

Dole v. Olmstead, 36 Ill. 150, 155;

Sawers Grain Co. v. Goodwin, 83 Ind. App. 556, 146 N. E. 837, 841;

Drudge v. Leiter, 18 Ind. App. 694, 49 N. E. 34, 37-38;

Arthur v. Chicago, Rock Island etc. R. Co., 61 Iowa 648, 17 N. W. 24, 25;

Forbes v. Fitchburg R. Co., 133 Mass. 154, 160;

Cushing v. Breed, 14 Allen (Mass.) 376, 380;

Weiland v. Sunwall, 63 Minn. 320, 65 N. W. 628, 629;

Tobin v. Portland Flouring Mills Co., 41 Ore. 269, 68 Pac. 743, 745;

Hamilton v. Blair, 23 Ore. 64, 31 Pac. 197, 198;

Goodman v. Northcutt, 14 Ore. 529, 13 Pac. 485, 488;

Young v. Miles, 20 Wis. 615, 623.

The trial court, however, while deciding that plaintiffs, as holders of warehouse receipts, were entitled to participate ratably in the remnant of the flour in the warehouse, and that their rights were not destroyed by any wrongful act of the Warehouse Company in intermingling flour belonging to different owners, nevertheless squarely held that such wrongful intermingling cut off the rights of the Bank under its otherwise valid pledge. The court said (Tr. pp. 38-40):

> "Now it seems to me very clear that in such a situation the Bank was not entitled to receive from the Warehouse Company any other property, or any other bags of flour than those which the Warehouse Company had received as a pledge, and which it had agreed to hold to the order of the Bank. Certainly neither the Bank nor the Overseas Warehouse Company had the right to appropriate the flour, or any part thereof, that had been stored with the Warehouse Company by the holders of these warehouse receipts in order to make good any misappropriation

or loss of such pledged property. The determination of the rights of these parties under their respective muniments of title, comes down, in my opinion, largely to a matter of proof. If the Bank were able to show, by a preponderance of the evidence, that these 45,000 bags of flour of Shanghai and Egyptian brands, and which had been received by the Warehouse Company as a pledge, were still in the warehouse or godown of the company, having been specially set aside and earmarked as the property of the Union Trading Company, then I take it that the Bank would be entitled to the possession of such property, even though there was not another bag of flour in the godown or warehouse which could be appropriated for the benefit of these plaintiffs as holders of godown warrants. But the difficulty, with respect to the claim of the Bank, is that no flour was found upon the premises specially ear-marked or set aside as the property of the Bank, or as the property of the Union Trading Company, and it may very well have been, in view of the misappropriation by the Warehouse Company of more than a million bags of flour, that the 'pledged flour,' in which only the Bank had an interest, was entirely misappropriated by someone connected with the Warehouse Company. *However that may be, as I view the case it was necessary for the Bank to prove by competent evidence that the flour which it claimed as a pledge and as security for the payment of its note, was in the possession of the assignee at the time he took over the 91,666 bags of flour of various brands on the 1st of August, 1927''* (italics ours).

We submit that the foregoing considerations apply as well to plaintiffs as to the Bank, and that they, therefore, afford no ground for allowing plaintiffs greater rights than the Bank to the flour on hand. A bailment covers specific, defined property (6 C. J. 1139) just as much as a pledge. If any one of the plaintiffs could have identified any of the flour which came into the hands of defendant as assignee, as the identical flour called for by its warehouse receipt, then

such plaintiff could have taken all of such particular flour, to the exclusion of everyone else. It is only when intermingled goods are indistinguishable that the doctrine of ratable distribution becomes applicable. Therefore, the ground on which the trial court refused to recognize the claim of the Bank, namely, that the property claimed by it was indistinguishable from the mass, is at variance with the very principle of ratable distribution on which plaintiffs rely, and which the trial court applied in this case, so far as plaintiffs are concerned.

The court cites no authority for its conclusion that the tortious commingling of the flour by the Warehouse Company extinguished the Bank's pledge. As opposed to this conclusion, the following cases are closely in point:

In *Easton v. Hodges* (C. C. Wis.) 18 Fed. 677, one Valleau operated a warehouse in which a man named Baker had deposited wheat. Baker made a loan from the plaintiffs, who were bankers, and as security had Valleau segregate some of the wheat into particular bins and deliver a warehouse receipt against the segregated wheat directly to the plaintiffs as pledgees. The plaintiffs also made a loan to Valleau on similar receipts for his own wheat which he set aside in the same bins. The defendants were purchasers from Valleau, against whom the plaintiffs, as pledgees, brought an action for conversion of the pledged wheat. One of the defenses was that Valleau had commingled the pledged wheat with other wheat into an indistinguishable mass and that the pledge was thereby destroyed. The court instructed the jury that these facts were not a defense, saying (p. 682):

> "The evidence tends to show (perhaps it would be more accurate to say the evidence does show) that

> after the bins of wheat pledged to plaintiffs and their assignors were selected and set apart for them, Valleau, without the knowledge and consent of the plaintiffs or the bank, and for the purpose of improving the grade of the wheat in those bins, mixed other wheat of his own of a better quality with the wheat in those bins, in such a manner as to render it impracticable to distinguish or separate the wheat so subsequently put into the bins, and so mixed, from the wheat in the bins at the time they were so selected and set apart. *I cannot think that such a mingling of plaintiffs' wheat with that of Valleau subsequently purchased from the farmers, or taken from other wheat in the elevator, without the plaintiffs' knowledge, would affect the plaintiffs' title to the wheat in those bins, but that their interest would attach to an equal number of bushels of the wheat in those bins upon and from the time of such mixing''* (italics ours).

Eggers v. Hayes, 40 Minn. 182, 41 N. W. 970, involved the same question as this case. It holds that where there is a shortage of commingled wheat in the possession of an insolvent warehouse, the holder of a receipt, *as pledgee,* is entitled to participate ratably with the other depositors. In that case the holders of warehouse receipts, like the plaintiffs in the case at bar, brought suit to exclude the defendant from participating in the wheat on hand. The defendant held a receipt which the warehouseman had issued as security upon grain of his own in order to secure his own debt. At the time of the issuance of the receipt the warehouseman had sufficient grain of his own in the warehouse to cover the pledge, so that the pledge was valid, under the decision in *National Exchange Bank v. Wilder,* 34 Minn. 149, 24 N. W. 699. Similarly in the case at bar the pledge was valid because the Trading Company actually delivered the flour into the warehouse

pursuant to the pledge. The court in the *Eggers* case reversed a decree excluding the pledgee from ratable participation. After citing *National Exchange Bank v. Wilder,* supra, to the point that the pledge was valid in its inception, the court said (p. 971):

> "In that case, which controls this, it was held, modifying what had been stated (unnecessarily for its determination) in Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. Rep. 244, that the statute embraced and included as depositors all who owned or held grain actually in store, whether deposited by themselves or by others to whose rights they have succeeded, and that no distinction can be made between the person who makes an actual physical delivery of his grain at the warehouse and the pledgee of the grain of a warehouseman—actually on deposit in his warehouse —who leaves it in store with the proprietor, as his bailee, taking a warehouse receipt therefor, and that in either event the parties have grain on deposit with the warehouseman.
>
> In the case at bar there was at the time of the pledge much more grain actually in store, the property of Meader & Co., than was needed to meet and redeem the storage receipt issued to appellant. Had it then been presented the required amount would have been delivered. Had appellant then returned the wheat to the custody of the warehouseman, taking a ticket or receipt, we see no reason why we should not have an actual depositor of the precise kind respondents' counsel insist should alone be recognized in the distribution of the wheat in question or its proceeds. It cannot be successfully urged that the scant formality of weighing a quantity of wheat out of a warehouse and then weighing it back again is essential to the protection of these who, following a well established custom, loan money on this form of security. *All of the receipt holders mentioned in the pleadings are entitled to participate*" (italics ours).

See also:

Forbes v. Fitchburg R. Co., 133 Mass. 154, 156, 160 (Holding pledgees of bill of lading could recover for conversion of wheat, notwithstanding commingling thereof with other grain in railroad's elevator);

Arthur v. Chicago, Rock Island etc. R. Co., 61 Iowa 648, 17 N. W. 24, 25 ("The mere fact of an admixture of goods of the same grade and quality does not divest the owner of his property, whether the act be done with or without his knowledge");

Edelhoff v. Horner-Miller Straw-Goods Mfg. Co., 86 Md. 595, 39 Atl. 314 ("The lien of a chattel mortgage is not impaired by a commingling of the goods mortgaged with other goods without the knowledge or consent of the mortgagee" (Syllabus));

National Exchange Bank v. Wilder, 34 Minn. 149, 24 N. W. 699 (A pledgee is a "depositor" under Minnesota statute providing that "whenever any grain is delivered for storage" the transaction is a bailment, notwithstanding agreement that warehouseman may intermingle grain and sell it for his account, and "The * * * pledgee becomes tenant in common with the other owners" (p. 700)).

Besides the foregoing rule with respect to intermingled goods, the law of confusion of goods also, we think, affords a clear analogy to the case at bar. It is settled that the rule, whereby a party loses his goods if he wrongfully or fraudulently confuses or commingles them with the goods of another person, so that they cannot be distinguished (12 C. J. 491, 492), does not operate to cut off the rights of innocent third persons in the mass (*Smith v. Town of Au Gres* (6th C. C. A.) 150 Fed. 257, 261; *Erie*

R. Co. v. Dial (6th C. C. A.) 140 Fed. 689, 691; *Virginia-Carolina Chemical Co. v. Rogers,* 172 N. C. 154, 90 S. E. 129; *National Park Bank v. Goddard,* 9 Misc. 626, 30 N. Y. S. 417, 420; 12 C. J. 496). In the case at bar plaintiffs in effect contend that, because of the wrongful acts of the Warehouse Company, the property of The National City Bank should be taken from it and applied upon their claims.

Second: The maxim invoked by plaintiffs in the court below that between equal equities the legal title prevails is inapplicable.

In the trial court plaintiffs argued that they were collectively holders of the legal title to the confused mass of flour, and that The National City Bank was only holder of a special property as pledgee, and on that ground contended that their claims were prior to those of the Bank under the maxim that where equities are equal the legal title prevails. The trial court evidently regarded this contention as unsound, because it is not mentioned in the opinion. As showing that the maxim invoked by plaintiffs has no application, we submit:

1. The cases already cited allow a pledgee to participate ratably with other receipt-holders where there is a deficiency in a commingled mass of goods.

2. The distribution of such a mass is not to be solely determined by the whereabouts of the legal title. The ruling maxim in such cases is that "equality is equity." It was so held in *Goodman v. Northcutt,* 14 Ore. 529, 13 Pac. 485, where the court said (13 Pac. 488):

> "There was a shortage of wheat in the warehouse before any was taken out to put aboard of said cars. There was only about two-thirds enough to pay the

> depositors, including the appellant, the amounts they had respectively stored there; and, the wheat not having been kept separate, the deficiency or loss, from whatever circumstance it may have occurred, if not occasioned by the fault of any of them, must fall upon all in the proportion which the amount of wheat each had deposited bore to the whole amount deposited. *This rule is based upon a maxim that all courts are bound to observe,—the maxim that equality is equity; and it certainly could have no better foundation*'' (italics ours).

In *Smith v. J. B. Moors & Co.*, 215 Pa. 421, 64 Atl. 593, a manufacturing company intermingled and pledged certain wool, to part of which one claimant had legal title and on the remainder of which another claimant had an equitable lien. Both claimants were subordinate to the pledgee, who had taken the pledge in good faith from the manufacturing company as ostensible owner. The one claimant, however, claimed that his legal title conferred priority over the equitable lien in the residue of the proceeds of the wool left after satisfying the claim of the pledgee. The court held that both claimants should participate ratably, quoting from 1 *Story's Eq. Jur.* (13th Ed.) Section 554, as follows:

> '' 'It is a general rule that equitable assets shall be distributed equally and pari passu among all the creditors without any reference to the priority or dignity of the debt; for the courts of equity regard all debts in conscience as equal jure naturali, and equally entitled to be paid; and here they follow their own favorite maxim that equality is equity. And if the fund falls short, all the creditors are required to abate in proportion.' ''

3. With respect to the pledged flour, there was outstanding in the Bank, as pledgee, and in the Trading

Company, as pledgor, a legal title to the pledged property held by the Warehouse Company, as complete and perfect as the title of any of the plaintiffs to property represented by their warehouse receipts. The Bank, as pledgee, represented this legal title to the extent necessary to protect the pledge. So, in *Means v. Bank of Randall,* 146 U. S. 620, the Supreme Court said (p. 627):

> "When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser, so far as the exercise of those rights was necessary to protect the holder."

See also:

Dale v. Pattison, 234 U. S. 399, 411;

Gibson v. Stevens, 8 How. 384, 400;

Groveland Banking Co. v. City National Bank, 144 Tenn. 520, 234 S. W. 643, 646;

First National Bank v. Lincoln Grain Co. (Neb.) 219 N. W. 192, 196;

Anderson v. Keystone Chemical Supply Co., 293 Ill. 468, 127 N. E. 668;

31 *Cyc.* 847-848.

4. A proceeding, like this proceeding, for the ratable distribution of a deficient quantity of warehoused goods is in equity, and all claimants must be made parties (*Dows v. Ekstrone* (C. C. Minn.) 3 Fed. 19; *Dole v. Olmstead,* 36 Ill. 150, 155; *Wieland v. Sunwall,* 63 Minn. 320, 65 N. W. 628; *Tobin v. Portland Flouring Mills Co.,* 41 Ore. 269, 68 Pac. 743; *Hamilton v. Blair,* 23 Ore. 64, 31 Pac. 197). The reason for making them parties is to permit them to set up their rights. We submit that plaintiffs, having disregarded this rule and failed to make either the Bank

or the Trading Company a party to the suit, are in no position to invoke the bare legal title outstanding in the Trading Company as an argument for depriving the Bank, as pledgee of the Trading Company, of its property.

This is independent of the non-joinder of the Bank and Trading Company as a ground, in and of itself, for reversal of the decree (see *National City Bank v. Harbin Electric Joint Stock Co.* (9th C. C. A.) 28 Fed. (2d) 468, and cases there cited).

Third: The difference in the form of the receipts held by plaintiffs from those issued to The National City Bank, as pledgee, does not justify exclusion of the Bank from ratable participation in the proceeds of the sale of the flour. The Warehouse Company was as much a bailee for the Bank, as pledgee, as it was for plaintiffs, as ordinary depositors.

There is, we submit, no difference between the relationship of the Warehouse Company to plaintiffs and its relation to the Bank, which justifies exclusion of the Bank from sharing proportionately in the proceeds of the sale of the flour. The Warehouse Company was as much a bailee for the Bank, as pledgee, as it was for plaintiffs, as ordinary depositors.

In *Union Trust Co. v. Wilson,* 198 U. S. 530, one Flanders, a merchant, leased part of his basement to a Warehouse Company, which assumed exclusive control of it. The Warehouse Company issued to Flanders a receipt for certain leather, which he endorsed to the defendant bank as security. In holding that the bank had a better title to the leather than the trustee in bankruptcy of Flanders, the court held that the issuance of the receipt as collateral security made the Warehouse Company bailee for the Bank as pledgee. The court said (p. 536):

> "No question under the statutes of Illinois is suggested. Apart from statute a warehouse receipt simply imports that the goods are in the hands of a certain kind of bailee. A bailee asserting a lien for charges has the technical possession of the goods. But it always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another to whom the owner has sold, mortgaged or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge."

To the same effect are:

Atherton v. Beaman (1st C. C. A.) 264 Fed. 878, 882;

Pierce v. National Bank of Commerce (8th C. C. A.) 268 Fed. 487, 493;

Cochran & Fulton v. Ripy etc. Co., 13 Bush (Ky.) 495, 506;

De Wolf v. Gardner, 12 Cush. (Mass.) 19, 25.

There being, as we contend, no substantial difference between the relationship of The Warehouse Company to plaintiffs and its relation to the Bank, it follows, we submit, that plaintiffs are not entitled to priority merely because their documents are called "godown warrants" and the Bank's documents are not called "godown warrants." The endorsements of the Warehouse Company on the Bank's documents, that it had received the pledged flour and would hold it subject to the Bank's order (Exh. 1, Tr. p. 19) are warehouse receipts just as much as the "godown warrants" of plaintiffs. It is well settled that a warehouse receipt need not be in any particular form (*Jones on Collateral Securities, Pledges* (3rd Ed.) p. 359). As pointed out by the Supreme Court in *Union Trust Co. v. Wilson,* 198 U. S. 530, supra, "Apart from statute a

warehouse receipt simply imports that the goods are in the hands of a certain kind of bailee."

The whole contention of plaintiffs, based on the difference in form between their warrants and the Bank's documents, is, we submit, a mere matter of names, affording no sound or just reason for differentiating between the parties. Equity regards substance rather than form (*Hurley v. Atchison etc. R. Co.*, 213 U. S. 126, 134; *Peugh v. Davis*, 96 U. S. 332, 336; 21 *C. J.* 204), and, as we have shown, applies in such cases as the present, the obviously fair and just principle that equality is equity.

CONCLUSION.

We submit that the decree below denying The National City Bank a ratable proportion of the amounts realized from the sale of the flour is inequitable and contrary to well settled principles of law, and that it should be reversed.

Dated, San Francisco,
May 18, 1929.

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No. 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, American Overseas Warehouse Company, Inc.,
Appellant and Cross-Appellee,

vs.

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Appellees and Cross-Appellants.

BRIEF OF DEFENDANT, R. T. McDONNELL, IN REPLY TO PLAINTIFFS' BRIEF AS CROSS-APPELLANTS, AND TO THEIR MOTION TO DISMISS THE APPEAL.

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PRELIMINARY STATEMENT.

This brief was written in reply to plaintiffs' brief on the cross-appeal. After it was finished plaintiffs, on Monday, June 10th, gave notice of motion to dismiss the appeal. Although hampered by the fact that but two days remained before the due date of this brief, we have, in the

interest of putting as much of our side of the case as possible under one cover, included herein an argument in opposition to the motion to dismiss. This seemed particularly desirable in view of the fact that plaintiffs' brief on the cross-appeal deals with the whole case and only incidentally with the cross-appeal as such. We have necessarily had to follow the range of plaintiffs' brief in this reply, but by so doing we hope to spare the court the burden of a further brief from us on the main appeal.

ARGUMENT.

I.

ANSWER TO THE MOTION TO DISMISS.

First: This is a suit in equity and not an action at law. The whole record is properly presented for review.

The grounds of the motion to dismiss are:

"1 The appeal presents no question of sufficiency of the evidence to support the judgment;

2 The appeal presents no error apparent on the face of the record."

These manifestly, we submit, are not grounds for dismissing the appeal. The absence of error is ground for affirmance, but so far as we have been able to find, it is not a ground for dismissal. The court obviously cannot determine whether or not there was error below, either apparent on the face of the record or otherwise, unless it considers the appeal (see *Bradley v. Eccles* (2nd C. C. A.) 120 Fed. 945, 952).

Aside from the foregoing, there is, we submit, in the inherent nature of the case, no merit either in plaintiffs'

motion to dismiss, or in the suggestion made in their brief on the cross-appeal (pp. 2-3), that the right of review is limited to errors apparent on the face of the record. Plaintiffs, in this behalf, are obviously invoking the rule that the only matters presented for appellate review *in an action at law* are errors apparent on the face of the record, unless a motion for judgment is made below and an exception reserved to an adverse ruling thereon (*Wulfsohn v. Russo-Asiatic Bank* (9th C. C. A.) 11 F. (2d) 715, 716; *China Press v. Webb* (9th C. C. A.) 7 F. (2d) 581, 582).

Nowhere do plaintiffs cite authority for their assumption that this is an action at law. We submit that it is not an action at law, but a suit in equity, in which, on settled principles, the whole record is properly before the court for review.

The proceeding is for the ratable distribution of the proceeds of the sale of a commingled mass of foods. In our former brief (Brief for Appellant, p. 18), we cited authorities holding that such a proceeding can only be maintained in equity. For convenience of reference we again cite and quote from these authorities.

In *Dows v. Ekstrone* (C. C. Minn.) 3 Fed. 19, the court stated the case and its ruling as follows (pp. 19-20):

> "Harris, the warehouseman who issued the receipts, either never received in store all the wheat represented as received, or, after receiving it, he sold or disposed of a portion of it.
>
> Just prior to the commencement of this suit he absconded, leaving in his warehouse only about 3,000 bushels of wheat to meet the outstanding receipts, or only about one-fifth the quantity required. In this state of things the creditors, represented by the de-

fendant, attached all the wheat in the warehouse as the property of Harris, and the plaintiffs, holding a majority of the receipts, replevied from defendant, claiming that their receipts entitled them to what was left. *Can they recover? Clearly not. When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting.* No one of such receipt holders can recover at law the whole, nor could any number of such holders, less than the whole number, recover possession as against the remainder. *This case must be brought in a court of equity,* where all the claimants can be heard and decree can be rendered establishing the rights of each with respect to the property in controversy. *It is a controversy which cannot be settled at law.* I will, therefore, direct that a juror be withdrawn, and that either party have leave to file a bill in chancery'' (italics ours).

In *Dole v. Olmstead,* 36 Ill. 150, a case which, like the foregoing case, involved the ratable distribution of a deficient quantity of warehoused grain, the court said (pp. 154-155):

"The only remaining question, is, whether a court of equity has jurisdiction of the case. By the assignment, appellants became trustees for all parties in interest, and as such became liable to perform all the duties imposed by that relation.

One of the duties of that relation is, to account for the proper application of the trust fund. And a court of equity, as a part of its original and inherent jurisdiction, compels the proper application of the trust funds, and requires the trustee to render an account of his proceedings under the trust. Had this property remained separate, it would be different, as in that case, the loss of each owner could have been ascertained, and the remedy at law would have been com-

plete. *It will also be observed, that there is not a complete remedy at law, as, by the confusion in the property, each party is disabled from showing the extent of his loss.* And those who should first sue would get more than their ratable portion of the property, appellants not being liable to make up the deficiency unless it could be shown that they had appropriated the grain to their own use. Thus a portion of the owners would be able to obtain no portion of the grain. And they would have no remedy except in a court of equity to compel contribution.

A court of equity has, therefore, jurisdiction to bring all the parties in interest before the court, and to do complete justice between them. It should ascertain the deficiency of the joint property, and decree that each joint owner share the loss in pro rata proportions'' (italics ours).

See also:

Hamilton v. Blair, 23 Ore. 64, 31 Pac. 197, 198 ("But to establish and enforce such ratable distribution the suit must be brought in equity * * *").

Tobin v. Portland Flouring Mills, 41 Ore. 269, 68 Pac. 743, 745 ("If * * * a deficiency occurred in the quantity so commingled, rendering it impossible for a depositor to show the extent of his loss, a court of equity could afford relief by * * * apportioning the loss pro rata among the joint owners").

Weiland v. Sunwall, 63 Minn. 320, 65 N. W. 628, 629 (holding that suit for ratable distribution of wheat must be in equity).

Since the suit is in equity, where an appeal is in theory a trial *de novo,* the whole case is presented for review (*O'Brien, Manual of Federal Appellate Procedure* (2 ed.) p. 57; 3 C. J. 314-315; see also *Wiscart v. D'Auchy,* 3 Dall. 321, 324; *Watt v. Starke,* 101 U. S. 247, 250-251; *Cincinnati*

v. Cincinnati etc. Traction Co., 245 U. S. 446, 454). An exception to a denial below of a motion for judgment or request for special findings is unnecessary, because "A bill of exceptions is altogether unknown in chancery practice" (*Ex parte Story,* 12 Pet. 339, 343; see also *Wilson v. Riddle,* 123 U. S. 608, 615; *Johnson v. Harmon,* 94 U. S. 371, 372; *Buessel v. United States* (2nd C. C. A.) 258 Fed. 811, 822; *Struett v. Hill* (9th C. C. A.) 269 Fed. 247, 249; *Southern etc. Assocn. v. Carey* (C. C. Tenn.) 117 Fed. 325, 330-331; *Continental Trust Co. v. Toledo etc. R. Co.* (C. C. Ohio) 99 Fed. 177; *Brinkley v. Louisville etc. R. Co.* (C. C. Tenn.) 95 Fed. 345, 351; 2 *Daniell's Chancery Pleading and Practice* (6th American ed.) p. 1113, *1120).

The fact that the part of the record containing the evidence in the present case is called a "bill of exceptions" (Tr. p. 53) is immaterial. Where a bill of exceptions is inadvertently settled in an equity case, it is to be considered as the statement of evidence required in equity practice (*United States v. Great Northern R. Co.* (9th C. C. A.) 254 Fed. 522, 526; *Goodwin v. United States* (6th C. C. A.) 295 Fed. 856, 858; *L. A. Westermann Co. v. Dispatch Printing Co.* (6th C. C. A.) 233 Fed. 609, 612; *O'Brien, Manual of Federal Appellate Procedure* (2nd ed.) p. 56).

Second: Even if this were an action at law, the case would be open to review for errors apparent on the face of the record. Such errors appear in the incorrect construction placed by the trial court on documents admitted by the pleadings, and in the nonjoinder of the Trading Corporation and The National City Bank, whom the pleadings show to be indispensable parties.

Even if this were an action at law, the case would still be open to review for errors apparent on the face of the record, that is, of the pleadings, process and judgment, notwithstanding that no motion for judgment was made or exception reserved below (*China Press v. Webb,* (9th C. C. A.) 7 F. (2d) 581, 582; *O'Brien, Manual of Federal Appellate Procedure* (2nd ed.) p. 8).

In the case at bar the complaint sets out a specimen of the documents held by plaintiffs (Exh. B, Tr. p. 6), alleging that it is typical of all these documents (Tr. p. 3). The answer admits these allegations (Tr. p. 12), but sets up the documents held by the National City Bank (Tr. p. 13). The existence of these documents is admitted by the reply, which quotes the endorsements made by the Warehouse Company in favor of the bank (Tr. p. 14).

The proper construction of these documents is, therefore, we submit, a question apparent on the face of the record, and plaintiffs, in their brief on the cross-appeal specifically so contend (Brief for Cross-Appellant, pp. 2-3). "The warehouse receipts and assignee's plan of distribution, and the cross-claimants 'godown warrants and trust receipts' * * * were parts of the pleadings" (Brief for Cross-Appellant, p. 43). Plaintiffs' motion to dismiss is directly contrary to the argument in their own brief.

There is a further error, apparent on the face of the pleadings, namely the nonjoinder of The National City Bank and its pledgor, the Trading Corporation, whom plaintiffs seek to exclude from participation in the fund. The Bank and the Trading Corporation, under the authorities already cited, are indispensable parties, and the fact that they are not joined in the suit is, in itself, a ground, apparent on the face of the record, for reversal of the decree (*National City Bank v. Harbin Electric Joint Stock Company* (9th C. C. A.) 28 F. (2d) 468, and cases there cited; Brief for Appellant, p. 19).

II.

ANSWER TO PLAINTIFFS' BRIEF ON THE CROSS-APPEAL.

The sole issue on the cross-appeal is the correctness of the ruling below allowing The National City Bank to participate ratably with plaintiffs in the proceeds of the sale of the flour with respect to the one godown warrant which it held (Tr. pp. 40-44, 50-51). The five transactions in which the Bank held assigned pledge agreements without godown warrants, are involved only on the main appeal (Brief for Appellant, pp. 2, 3, 5).

Plaintiffs' brief, however, deals only incidentally with the issue on the cross-appeal; it is principally an argument upon the main case, as appears from plaintiffs' statement of their position. They say (Brief for Cross-Appellants, pp. 1-2):

> "The only two issues on cross-appeal are of law.
>
> One: In this action of debt, in United States jurisdiction in China, where common law strongly prevails, defendant cross-claiming with profert in the plead-

> ings,—was the judgment on the cross-claim responsive?
>
> Two: On said cross-claim, which was on behalf of the National City Bank of New York,—were certain 'godown warrants or trust receipts' held by that Bank equivalent in law to the warehouse receipts held by plaintiffs, the Chinese Banks?''

As we said at the outset, we will answer the arguments of plaintiffs relating to both the main appeal and cross-appeal. We submit:

First: A decree allowing the bank to participate is clearly responsive to the pleadings (Answering Brief for Cross-Appellants, pp. 25-27).

Plaintiffs' argument that the decree, in so far as it favors The National City Bank, is not "responsive," we understand to be in substance as follows: (1) That this is an action of debt. (2) That in an action of debt "a writing proved to be the defendant's could not be contradicted. For if a man said he was bound, he was bound." (3) That "to the requirement of 'a writing proved to be the defendant's' * * * the judgment does not respond" (Brief for Cross-Appellant, pp. 25-26).

Plaintiffs nowhere specify what writing binds defendant so that he cannot contradict it, but we assume that their contention is that, since defendant admitted the validity of the warehouse receipts held by plaintiffs, he cannot "in this action of debt" set up the rights of The National City Bank in diminution of plaintiff's claims against the fund in his hands.

In reply to this contention we submit:

A. This is a suit in equity and not an action at law; further, if an action at law would lie under the facts of

this case, debt would be an improper form of action, because plaintiffs' claims are not for sums certain.

B. A decree recognising the rights of The National City Bank is clearly within the issues, and would be within the issues even under rules of pleading applicable in actions of debt.

C. Even if this suit were an action of debt, there would be no rule of law under which defendant's admission of the validity of plaintiffs' warrants would prevent his setting up any other proper defense to their claims.

A. This is a suit in equity and not an action at law; further, if an action at law would lie under the facts of this case, debt would be an improper form of action, because plaintiffs' claims are not for sums certain.

The authorities already cited (supra I, *First*) show, we submit, that this is a suit in equity, and is not and could not be an action at law. Further, and apart from this controlling consideration the suit manifestly could *not* be an action of debt. Debt would lie at common law only for "a sum certain of money or for the delivery of an ascertained amount of ponderable or measurable chattels" (*Street, Foundations of Legal Liability*, Vol. 3, p. 127; see also Chitty on Pleading, 13th American Ed. Vol. 1, p. 109). Whether the action was for money or chattels, certainty of the thing sued for was an indispensable requisite to its maintenance. So, in *Street, Foundations of Legal Liability*, the author says (Vol. 3, p. 135):

> "In the early history of the action of debt the requirement that the claim sued on should be for a sum certain of money or for an ascertained amount of

> ponderable chattels was rigidly insisted upon. It resulted that the plaintiff must always prove his claim to the exact extent sued for or he recovered nothing at all. To allege a debt for one amount and to prove for another was a fatal variance. This was apparently the rule, at least in theory, as late as Blackstone's day, and this writer tells us that if one brought an action of debt for thirty pounds and only proved twenty pounds he could no more recover than if in detinue he sued for a horse and proved that the defendant detained his ox."

At no stage of its history would the action lie except for a sum certain in money or measurable chattels; it was inherently limited to claims for the recovery of debts, *eo nomine* and *in numero* (*Carroll v. Green,* 92 U. S. 509, 513; *Stockwell v. United States,* 13 Wall. 531, 542; *Du Bois v. Seymour* (3rd C. C. A.) 152 Fed. 600, 602; see also *Blackstone's Commentaries,* Book 3, pp. 154-155; *Street, Foundations of Legal Liability,* Vol. 3, p. 126; *Holdsworth's History of English Law,* 3rd Ed. Vol. 3, p. 420, et seq.).

In this case the plaintiffs do not claim, and in the nature of the case could not claim, definite amounts of flour or money. As the court said in *Dole v. Olmstead,* 36 Ill. 150, 155, supra, a case similar to the present case: "* * * by the confusion in the property, each party is disabled from showing the extent of his loss." The very reason for this suit is that there was not enough flour in the hands of defendant to meet all the receipts, and plaintiffs, therefore, sue for pro rata shares of the sum for which, by consent, the flour has been sold. These pro rata shares necessarily depend upon extrinsic matters to be found by the court, such as the amount of flour left on hand, the number of bags of each brand and the number and

validity of the outstanding receipts. Indeed the court below readjusted certain claims of the plaintiffs among themselves because the claims were based on incorrect assumptions as to the number of bags of flour of various brands (Tr. pp. 47-48). The first principles governing actions of debt prevent its use under such circumstances (see *Cassady v. Laughlin,* 3 Blackf. (Ind.) 134; *Watson v. M'Nairy,* 1 Bibb. (Ky.) 356; *Bruner v. Kelsoe,* 1 Bibb. (Ky.) 487; *Snell v. Kirby,* 3 Mo. 21, and authorities cited supra).

B. A decree recognizing the rights of The National City Bank is clearly within the issues and would be within the issues even under rules of pleading applicable in actions of debt.

The pleadings are summarized in our former brief (pp. 5-7).

Plaintiffs call defendant's pleading a "cross-claim." This, however, is inaccurate terminology. If the present proceeding were, as plaintiffs incorrectly assume, an action of debt and not a suit in equity, the answer would properly be described as containing two pleas in bar, the first a traverse of plaintiffs' claim to all of the proceeds of the flour, and the second, a special plea in confession and avoidance setting up the rights of The National City Bank under the documents held by it. This manner of pleading would have been strictly proper at common law. So, in *Chitty on Pleading* (13th American ed.), the author says (pp. 525-526):

> "A plea in bar, unlike a plea in abatement, offers matter which is a conclusive answer or defence to the action upon the merits. It is obvious that such a plea must contain either, 1st, a *traverse* or denial of the plaintiff's allegations; or, 2ndly, an express or implied *admission* that such allegations are true,

with a statement of matter which destroys their effect. In other words, a plea in bar must *deny,* or *confess and avoid* the facts stated in the declaration. Pleas in bar are not therefore susceptible of any other division than, 1st, pleas of *traverse* or *denial;* 2ndly, pleas by way of *confession* and *avoidance.*

Pleas in *denial* are either the general issue in those actions in which so general a traverse is admissible, or they occur in instances in which, there being no general issue, as in covenant, etc., some specific fact is specially disputed. The doctrine of *Traverses* will be discussed in a subsequent part of the work.

The quality of a plea in *confession* and *avoidance* is more peculiar, and demands particular attention. A plea of this description is either in *justification* or *excuse* of the matters alleged in the declaration; as imprisonment under a magistrate's warrant, or *son assault demesne* in trespass; or it is in *discharge* of the same action by subsequent matter, as accord and satisfaction, or a release. It is observable that each of these pleas admit the mere *facts* stated in the declaration, as that the defendant committed the trespasses charged; that the *contract was made or the debt* was incurred, etc. But the matter which they allege by way of defence defeats or avoids the legal effect of those debts, and disapproves, if true, the plaintiff's right of action'' (author's italics).

Under these principles, to cite a few out of a multitude of possible examples, a defendant in debt has been allowed, by special plea in confession and avoidance, to show payment or setoff *(Merryman v. Wheeler,* 130 Md. 566, 101 Atl. 551, 552); an injunction against collection of the debt sued for (*Palmer v. Palmer,* 2 Miles (Pa.) 373); an accord and satisfaction *(M'Guire v. Gadsby,* 3 Call. (Va.) 234); a release *(Klair v. Philadelphia etc. R. Co.,* 2 Boyce (Del.) 274, 78 Atl. 1085, 1092); usury *(Nichols v. Stewart,* 21 Ill. 106), or *ultra vires (Conowingo Land Co. v. McGaw,* 124 Md. 643, 93 Atl. 222, 226).

C. Even if this suit were an action of debt, there would be no rule of law under which defendant's admission of the validity of plaintiffs' warrants would prevent his setting up any other proper defense to their claims.

The only authority cited by plaintiffs (Brief for Cross-Appellants, p. 25) for their contention that "in this action of debt" defendant's admission of the validity of plaintiffs' receipts precludes him from showing the right of The National City Bank to share with plaintiffs in the proceeds of the flour is the following passage from *Holmes, The Common Law*, from which, however, they omit the italicized part (pp. 261-262):

> "It is manifest that a witness oath, which disposes of a case by the simple fact that it is sworn, is not a satisfactory mode of proof. A written admission of debt produced in court, and sufficiently identified as issuing from the defendant, is obviously much better. *The only weak point about a writing is the means of identifying it as the defendant's, and this difficulty disappeared as soon as the use of seals became common. This had more or less taken place in Glanvill's time, and then all that a party had to do was to produce the writing and satisfy the court by inspection that the impression on the wax fitted his opponent's seal. The oath of the secta could always be successfully met by wager of law, that is, by a counter oath on the part of the defendant, with the same or double the number of fellow swearers produced by the plaintiff.* But a writing proved to be the defendant's could not be contradicted. For if a man said he was bound, he was bound."

Plaintiffs evidently interpret the foregoing to mean that, as a matter of law, no defense can be made in an action of debt to an apparent obligation evidenced by the defendant's signature. We submit that this is incorrect. The italicized part of the quotation, which plaintiffs do not quote, shows the true meaning of the sentences on which

plaintiffs rely, namely, that in Glanvill's time of which the author was speaking a writing signed by the defendant could not be contradicted *by wager of law.** This is demonstrated by a brief further reference to the context, which plaintiffs' fragmentary quotation disregards.

Justice Holmes, in the passage quoted, *was not writing about defenses to the action of debt,* but about the history of contract and particularly of the doctrine of consideration. This doctrine, like many another important principle of substantive law, he thought might have had its origin in "some forgotten circumstance of procedure" *(The Common Law,* p. 253). He suggested that consideration originated in the circumstance that in debt, the earliest contract action, one of the ways in which the plaintiff might make his preliminary proof was by the "oath of the *secta" (The Common Law,* p. 258), or "foreoath" of complaint witnesses *(Street, Foundations of Legal Liability,* Vol. 3, p. 24), and that it happened, for reasons which the author explains (pp. 257-258) that "when a debt was proved by witnesses there must be *quid pro quo"* (p. 258). In his development of this idea, Justice Holmes referred to the ways in which a plaintiff in debt might "maintain his cause." He said *(The Common Law,* pp. 254-255):

> "It was observed a moment ago, that, in order to recover against a defendant who denied his debt, the plaintiff had to show something for it; otherwise he was turned over to the limited jurisdiction of the spiritual tribunals. This requirement did not mean

*The wager of law was later allowed as a defense to any action of debt on a simple contract, although it was never permitted in defense to an instrument under seal (*Holdsworth, History of English Law* (3rd ed.) Vol. 1, p. 423; *Holmes, The Common Law,* p. 263; *Street, Foundations of Legal Liability,* Vol. 3, pp. 138-139).

> evidence in the modern sense. It meant simply that he must maintain his cause in one of the ways then recognized by law. These were three, the duel, a writing, and witnesses."

This is the same "writing" which is later referred to in the passage quoted by plaintiffs where the author tells why a writing was a more satisfactory method than the "oath of the *secta*" for making the plaintiff's proof, and therefore why the oath of the *secta* fell into disuse. This discussion, as above stated, is in development of the author's suggestion that the procedure regarding the witness oath contained the germ of the doctrine of consideration. Both the witness oath and the "writing" are discussed in connection with the maintenance of the plaintiff's case, not in connection with defenses.

Nowhere in the discussion is there any suggestion of such a rule as that for which plaintiffs here contend, namely, that no defense can be made in debt to an obligation evidenced by a writing of the defendant. Manifestly, no such rule could exist. To illustrate, let us assume a promissory note, which is a clear instance of a case wherein "a man said he was bound" and wherein debt was a proper form of action. On plaintiffs' theory no defense at common law could be made to an action of debt upon the note if the signature of the defendant was proved. But it is elementary that the defendant in debt, either under the general issue in a proper case, or under special pleas in abatement or in bar, might show lack of consideration or failure of consideration or any other of the many defenses which the circumstances might justify, such as, in this case, the outstanding right of a third person to part of the debt claimed (18 C. J., pp. 15-18, and authorities cited supra).

Second: The National City Bank, as assignee of valid pledges made by the Trading Company to the Warehouse Company, and as holder of the Warehouse Company's receipts evidencing the deposit of the flour subject to the pledges, is entitled to participate ratably with the other receipt-holders in the distribution of the proceeds of the sale of the flour (Answering Brief for Cross-Appellants, pp. 29-43).

In answer to the parts of plaintiffs' Point Two (Brief for Cross-Appellant, p. 29) in which they attack the validity of the original pledge by the Trading Corporation to the Warehouse Company and the assignment of the pledge by the Warehouse Company to The National City Bank, we submit:

A. The Trading Corporation made actual delivery of flour to the Warehouse Company in pledge. The trial court so found. Its finding is supported by the recitals of the pledge agreements, and there is no evidence to the contrary.

B. The claim of the plaintiffs that the pledge was "fraudulent on the part of the warehouse" is outside the record and is also wholly immaterial, there being no claim or suggestion that the Bank had any knowledge of the alleged fraud.

C. It was not necessary to the validity of the assignment of the pledge that the Warehouse Company, the original pledgee, should have delivered possession of the flour to the Bank as assignee. Transfer of possession is required to make a pledge valid in its inception but is not necessary to establish a valid assignment of the pledgee's rights.

Other contentions made by plaintiffs under their Point Two we will discuss after presenting the foregoing points (infra, *Second,* D).

A. The Trading Corporation made actual delivery of flour to the Warehouse Company in pledge. The trial court so found. Its finding is supported by the recitals of the pledge agreements, and there is no evidence to the contrary.

The recitals in the pledge agreements and in the assignments thereof to the effect that the flour had been delivered by the Trading Corporation to the Warehouse Company, and was held by the Warehouse Company to the order of the Bank, as assignee of the pledge (Exh. 1, Tr. pp. 16, 19; see also Brief for Appellant, pp. 4 and 5), are amply sufficient to support the finding of the trial court that there was an actual delivery of the flour by the Trading Corporation to the Warehouse Company in pledge. *The agreements containing these recitals were received without objection from plaintiffs* (Tr. p. 54), *and there is no contrary evidence.*

In *Maryland Casualty Co. v. Washington Loan & Banking Co.* (Ga.) 145 S. E. 761, a warehouse company had issued receipts to the plaintiff bank as pledgee to secure the warehouse company's debt. The receipts carried a statement by the warehouse company that the cotton covered thereby was on hand and free of encumbrances. In a suit on the warehouse company's bond the defendant claimed that the complaint did not show a valid pledge of the warehouse receipts, for the reason that it did not allege that the warehouse company had free cotton on hand at the time it issued the receipts. The court held that the recitals of the receipts made the necessary showing in this behalf. The court said (p. 765):

> "Again it is insisted that the petition of the bank does not allege that the receipts represented actual bales of cotton stored in the warehouse. This is not necessary. The petition alleges that the warehouse company issued receipts for marked and designated

bales of cotton. These receipts recited that this cotton was stored in the warehouse of the warehouse company, and that the cotton would be delivered to the order of that company. These receipts were indorsed by the warehouse company and pledged by it to secure the debt of the company to the bank. *These allegations were tantamount to a statement that this cotton was actually in the warehouse at the time the receipts were issued. The clear presumption from these facts is that the cotton was in the warehouse at the time the receipts were issued.* Certainly the bank, in extending credit to the warehouse company, was authorized to act upon the statement in these receipts that the cotton was stored in the warehouse, and would be delivered on the order of the warehouse company. The indorsement of these receipts by that company was such an order. Upon the indorsement and delivery of these receipts, the relation of bailor and bailee between the bank and the warehouse was created'' (italics ours).

See also:

Parshall v. Eggert, 54 N. Y. 18, 23, 25;

Hibbard v. Merchants' Bank, 48 Mich. 118, 11 N. W. 834, 836.

There is no evidence contrary to the recitals in the pledge agreements that the flour was delivered to and held by the Warehouse Company in pledge. The only evidence offered by plaintiffs in opposition to these recitals was a translation of a tally book kept in Chinese by a Chinese employee of the Warehouse Company. No testimony was offered to authenticate this book except certain questions which plaintiffs asked of defendant (Tr. pp. 55, 51). Plaintiffs did not produce the man who made the entries, although he was available (Tr. p. 60). No showing was made that the book contained original entries, or that it had been regularly kept. On the contrary, it appeared

from defendant's testimony that the book did not contain the godown keeper's complete record, and that there was no way of checking its correctness (Tr. pp. 60-61). The trial court sustained defendant's objection to the book (Tr. pp. 61-62). Plaintiffs have not questioned the correctness of this ruling, and we will, therefore, not discuss it further.

B. The claim of plaintiffs that the pledge was "fraudulent on part of the warehouse" is outside the record and is also wholly immaterial, there being no claim or suggestion that the Bank had any knowledge of the alleged fraud.

Plaintiffs claim that the pledge agreements were "fraudulent on part of the warehouse" (Brief for Cross-Appellants, p. 6).

To this the answer might be made that even if the fact were as plaintiffs say, it would not affect the rights of the Bank, there being no suggestion that the Bank had knowledge of the alleged fraud.

To quote from *Bush v. Export Storage Co.* (C. C. Tenn.), 136 Fed. 918, 934:

> "It is very true, as plaintiffs' able counsel has so clearly said, that 'good faith does not make good a pledge, unless there has been a delivery of possession, either actual or constructive.' * * * On the contrary, it is equally true that, if these warehouse receipts had their origin in a valid pledge, they passed to the defendant banks as innocent holders, as symbolic representatives of property, and their defense as assignee for value in good faith is a complete answer to every other objection urged in support of this bill. Their defense as assignees for value in good faith is good against every other ground on which this suit rests. *And nothing in the dealings or methods between the pledgor and warehouse companies as bailees before or subsequent to a valid pledge of*

> *property which once passed into the hands of an innocent holder could affect or destroy the rights of such holders''* (italics ours).

It is, of course, manifest that the Warehouse Company was guilty of a most aggravated fraud in the misappropriation of more than a million bags of flour belonging to innocent holders of outstanding documents. But the Bank was as much a victim of this fraud as were the plaintiffs. Plaintiffs manifestly cannot improve their case at the expense of the Bank by reiterating the admitted fraud which caused their common misfortune.

Plaintiffs also say (Brief for Cross-Appellants, pp. 28-29):

> ''The principal client, although not the only client of the Warehouse Company, was a Chinese concern known as the Union Trading Corporation. This Company failed in July, 1927, involving the Warehouse Company which had been its chief instrument in respect of a series of extensive frauds. It was the custom of the Union Trading Corporation to store, or to purport to store, with the Warehouse Company flour and other merchandise, export and import, and to borrow money of the Chinese Banks on the security of the relative godown warrants. It was also its custom to borrow money from the Warehouse Company and to secure it, or to purport to secure it, by deposit or alleged deposit of goods by way of collateral security. In the former case a document of title was issued the signer of which, the Warehouse Company,
>
> 'was estopped or not permitted to deny the existence of the facts represented in or by them.' *Hale v. Milwaukee Dock Co.,* 29 Wis. 482, 9 Am. Rep. 603.
>
> In the latter case at most the warehouse company acquired a special property in the goods as pledgee. * * *''

The relations between the Warehouse Company and the Trading Corporation are, we submit, clearly immaterial (*Bush v. Export Storage Co.* (C. C. Tenn.) 136 Fed. 918, 934, quoted supra). Furthermore, plaintiffs' statements in this behalf are outside the record, and are, therefore, not entitled to consideration. Since, however, plaintiffs have seen fit to make them, we may say in reply that they demonstrate the absolute lack of any substantial ground for preferring plaintiffs' claims over those of The National City Bank. On plaintiffs' own statement, there is not a scintilla of substantial difference between the claims. The Bank and plaintiffs were both lenders of money for the benefit of the Trading Corporation, on the security of documents issued by the Warehouse Company and calling for warehoused flour. The only difference is the purely formal difference that the plaintiffs' documents were all called godown warrants, whereas in five out of the six cases the documents of The National City Bank were not called godown warrants. This, however, is a mere matter of names, which, we submit, will not be allowed to determine the rights of the parties (Brief for Appellant, pp. 19-21).

C. It was not necessary to the validity of the assignment of the pledge that the Warehouse Company, the original pledgee, should have delivered possession of the flour to the bank as assignee. Transfer of possession is required to make a pledge valid in its inception, but is not necessary to establish a valid assignment of the pledgee's rights.

The circumstance that The National City Bank did not obtain possession of the pledged flour in no way militates against the validity of its rights as pledgee. The Bank was not the original pledgee, but the assignee of the original pledgee. The pledgee was the Warehouse Company, which, received the flour in pledge from the pledgor, the

Trading Corporation, and which transferred its rights to the debt secured by the pledge and to the pledged property to The National City Bank by delivery of the pledge agreements, with the following endorsement, which we again quote for convenient reference (Tr. p. 19):

> "We have received the goods mentioned in this instrument and will hold same to the order of The National City Bank of New York and we hereby transfer all our rights under this instrument to The National City Bank of New York.
>
> The American Overseas Warehouse Co., Inc.,
> (Sgd.) C. H. Cornish,
> General Manager."

It is thoroughly settled that the assignee of a debt secured by pledge need not take possession of the pledged property. The possession of original pledgee inures to his benefit. So in *Ramboz v. Stanbury,* 13 Cal. App. 649, 110 Pac. 472, the court said (13 Cal. App. 652):

> "Appellants also contend that the evidence was insufficient to support the finding to the effect that the stock pledged as security for the payment of the note was transferred to the bank. No evidence was offered upon the subject; none was necessary. The indorsement and transfer of the note carried with it the collateral pledged as security for the payment thereof. (Civ. Code, sec. 1084; *Duncan v. Hawn,* 104 Cal. 10, (37 Pac. 626).) *Plaintiff's right to the collaterals pledged was not dependent upon the actual delivery thereof. His interest therein was by virtue of being the holder of the note, and if the payee of the note, after transferring the same, retained the collaterals, his holding was as trustee for the bank."* (Italics ours).

To the same effect are:

Church v. Swetland, (2nd C. C. A.) 243 Fed. 289, 297;

In re Milne, (2nd C. C. A.) 185 Fed. 244, 249;

Dibert v. D'Arcy, 248 Mo. 618, 154 S. W. 1116, 1126; *Holland Banking Co. v. See,* 146 Mo. App. 269, 130 S. W. 354, 356.

A mere assignment of the debt secured by a pledge carries the pledge. In the case at bar the Warehouse Company not only made such an assignment, but also specifically undertook to hold the pledged flour to the order of The National City Bank (Tr. p. 19). This clearly made the Warehouse Company bailee or custodian for the Bank. Authorities on this point are cited in our first brief (p. 20). From one of them we will briefly quote (*Atherton v. Beaman,* 264 Fed. 878, 882):

> "Under the decisions of the Supreme Judicial Court of Massachusets acceptance of an order is sufficient delivery of goods in pledge to the holder of the order, and the warehouseman, by whom the order has been accepted may become the bailee or custodian for the pledgee. (Citing cases.) These decisions are in accord with those of the federal courts."

The purpose of requiring delivery of possession to make a good pledge in the first instance is "to negative the existence of apparent ownership in the pledgor" (*Philadelphia Warehouse Co. v. Winchester,* (C. C. Del.) 156 Fed. 600, 611 and cases cited). Where a pledgee has possession, there is no ostensible ownership in the pledgor, and no need for further transfer of possession on assignment of the pledge. An analogous situation was involved in *Pierce v. National Bank of Commerce,* (8th C. C. A.) 268 Fed. 487. The court there held that where bonds were pledged with a bank, the owner could make a further pledge of his equity in them to the plaintiff by a pledge agreement, coupled with notice to the bank, no change of possession being necessary. The court said (pp. 492-493):

"One of the reasons, and probably the chief reason, for the alleged general rule that a deposit of the thing pledged is an indispensable attribute of a valid pledge, is that such a pledge is indispensable to prevent the possession by the pledgor of the thing pledged from giving to him a false credit, just as the failure to deliver personal property sold causes a false credit to the vendor and avoids the sale. This reason, however, ceases when at the time of the pledge the thing pledged is not in the possession of the pledgor, but is in the possession and control of a third party. On this account, probably, the authorities disclose the fact that in cases of the second class, of which the case at bar is one, an exception to the general rule of the necessity of the delivery of the thing pledged to the pledgee in order to make a valid pledge early arose, and has increased in strength and breadth, until it has now become as general as the rule itself, an exception to the effect that, when the thing pledged was in the possession or control of a third party at the time of the alleged pledge, it might be effectually pledged by the owner of it, or by the owner of an interest in it, without any change of possession or control of it, if notice of the fact of the pledge was given to the party in possession."

D. Answering miscellaneous arguments made under plaintiffs' Point Two.

1. The argument that the commingling by the Warehouse Company of the pledged flour with other flour, and its misappropriation of part of the mass, destroyed the Bank's pledge (Brief for Cross-Appellant, pp. 32, 37) is answered in our former brief (pp. 9-16).

To the authorities there cited we add *Bush v. Export Storage Co.* (C. C. Tenn.) 136 Fed. 918, 934-935, which holds that a pledge is not destroyed by the fact that the warehouseman and pledgor, without the pledgee's consent,

withdraw part of the pledged property and substitute other property of the same kind.

2. The argument that plaintiffs are entitled to priority on the theory that they hold legal title, whereas the Bank has only a special property as pledgee (Brief for Cross-Appellants, pp. 38-39) is also answered in our former brief (pp. 16-21).

3. The argument is made that a warehouseman cannot issue a valid warehouse receipt as security for his own debt. But no situation to which this argument could apply is involved in this case. The National City Bank is not the pledgee of the Warehouse Company, but is the assignee of a pledge from the Trading Corporation, which the uncontradicted evidence shows to have been valid.

It may be said in this connection, however, that the rule is thoroughly settled that a *public* as distinguished from a *private* warehouseman can create a valid pledge as security for his own debt merely by issuing a warehouse receipt, no delivery of possession being necessary, provided only that he has free goods on hand when he issues the receipt (*National Exchange Bank v. Wilder,* 34 Minn. 149, 24 N. W. 699, 700; *Merchants etc. Bank v. Hibbard,* 48 Mich. 118, 11 N. W. 834; *Alabama State Bank v. Barnes,* 82 Ala. 615, 2 So. 349, 350-351; *Millhiser Mfg. Co. v. Gallego Mills Co.,* 101 Va. 579, 44 S. E. 760, 764; *Maryland Casualty Co. v. Washington Loan etc. Co.,* (Ga.) 145 S. E. 761, 764, and citations; see also *Dale v. Pattison,* 234 U. S. 399; *Taney v. Pennsylvania Bank,* 232 U. S. 174; *Gibson v. Stevens,* 8 How. 384).

The case of *Fourth Street Bank v. Millbourne Mills Co.,* (4th C. C. A.) 172 Fed. 177, cited by plaintiffs (Brief for

Cross-Appellants, p. 32), involved a milling company which was a *private* warehouseman (172 Fed. 181), and which moreover, under the agreements involved in that case, had the right to mill the grain against which the receipts issued and substitute other grain therefor (172 Fed. 181-182). The reservation of such rights was in itself enough to prevent the transaction between the milling company and the receipt-holder from being a bailment or a pledge; under such circumstances it was a *mutuum*, in which title remained in the milling company (see *National Exchange Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699, 701; *Rahilly v. Wilson*, (C. C. Minn.) Fed. Cas. No. 11,532).

As illustrating the validity of a pledge created by the issuance of a document by a *public* warehouseman to secure his own debt, we will quote one passage from one of the cases cited above *(National Exchange Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699, 700):

> "The rule is as universal as it is elementary that possession by the pledgee is necessary to the existence and continuance of a pledge. But this need not be actual physical possession. The delivery of a recognized symbol of title, such as a bill of lading or a warehouse receipt, which serves to put the pledgee in the control and constructive possession of the property, is sufficient. Jones, Pledges, Sec. 37. Where property is in store with a warehouseman, the delivery of the warehouse receipt to the pledgee carries with it the constructive possession, and from the time of the transfer the warehouseman becomes the bailee of the pledgee. In accordance with this theory, and in harmony with the usages of trade, the tendency of the later authorities (although the proposition has been sometimes doubted or denied) is to hold that the owner of goods, *if a warehouseman,* can pledge the same by issuing and delivering his own warehouse

receipt to the pledgee. Colebrooke, Coll., Sec. 420; *Easton v. Hodges,* 18 Fed. Rep. 677; *Merchants' Bank of Detroit v. Hibbard,* 48 Mich. 118; s. c. 11 N. W. Rep. 834. The power of a warehouseman to make a delivery in this way, in case of a sale, is well settled. *Gibson v. Stevens,* 8 How. 399; *Broadwell v. Howard,* 77 Ill. 305. And we are unable to see any good reason founded on principle for any distinction in this regard between a sale and a pledge. If any distinction is made, it must be a purely technical one, without practical value, and which would never commend itself to business men. Such distinctions should be rejected by courts. There is no good reason in the nature of things why a delivery which is sufficient in case of a sale should not be so in case of pledge. When the pledgor or the vendor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, although the actual physical possession is in himself. And where the property is a part of a larger mass of the same kind and quality, as wheat in an elevator, separation or segregation from the uniform mass is not necessary to constitute an appropriation of the property to the contract.

The vendee or pledgee becomes tenant in common with the other owners. *Forbes v. Railroad Co.,* 133 Mass. 154." (Italics by the court.)

4. There is, we submit, no merit in plaintiffs' claim that the documents held by The National City Bank and issued by the Warehouse Company in aid of a pledge, were "issued out of course of legitimate warehouse business" (Brief for Cross-Appellants, p. 7) or in the further claim that these documents were taken "with notice of being of no effect" (Brief for Cross-Appellants, p. 7). These contentions rest on the unsupported statement that "Storage of goods is the sole business" of a warehouseman (Brief for Cross-Appellants, p. 23). Apparently the theory is that a warehouseman has no power to make or

accept a pledge, and therefore that the Bank, knowing that its assignee was a warehouse company, obtained nothing by the pledge assignments. This contention is clearly contrary to the authorities, recognizing the capacity of a warehouseman to make a valid pledge, even for his own debt.

5. The rule that "when a deficiency arises in the grain, any which is still owned by the warehouseman is appropriated for the benefit of the holders of other warehouse receipts" (Brief for Cross-Appellants, p. 34, quoting 27 R. C. L. 979) is manifestly inapplicable in this case. The flour as to which defendant claims a pro rata share for The National City Bank was not "owned by the warehouseman"; it was owned by the Bank and its pledgor.

6. Plaintiffs' arguments based on the mere difference in form between their documents and the pledge agreements held by the Bank are discussed in our former brief (pp. 19-21). We may add that plaintiffs have nowhere tried to show how these arguments are applicable to the transaction involved on the cross-appeal, in which there is no difference in the form of the documents.

CONCLUSION.

We respectfully submit that the motion to dismiss defendant's appeal is without merit and should be denied. We further submit that the ruling of the court below which is involved on the cross-appeal is correct, but that its decree denying The National City Bank the right of ratable participation with respect to the transactions involved on the main appeal is inequitable and unfounded in law, and that it should be reversed.

Dated, San Francisco,
June 12, 1929.

FLEMING, FRANKLIN & ALLMAN,
PILLSBURY, MADISON & SUTRO,
Attorneys for Appellant.

ALFRED SUTRO,
EUGENE M. PRINCE,
Of Counsel.

No 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

vs

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants

FOR APPELLEES:

A BRIEF ON MOTION TO DISMISS APPEAL

B ALTERNATIVELY, REPLY BRIEF ON MERITS OF APPEAL

P. H. B. KENT,
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of Kent & Mounsey,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Cases Cited, and Other Authorities Referred to

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Appellees and Cross-Appellants

FOR APPELLEES:

A BRIEF ON MOTION TO DISMISS APPEAL

I REPRINT OF TEXT OF MOTION

The original of the motion, of notice thereof and of admission of notice are filed in the office of the Clerk of Court. They read as follows:

[Title of Court and Cause]

MOTION TO DISMISS APPEAL

Appellees respectfully move to dismiss appeal, and as reasons for said motion they assign:

1 The appeal presents no question of sufficiency of the evidence to support the judgment;

2 The appeal presents no error apparent on the face of the record.

And appellees request that the entire transcript of record on appeal be taken as incorporated with this motion.

Dated: June 10, 1929

Signed: Above named Appellees
by P. H. B. KENT
and FRANK E. HINCKLEY
their Attorneys

NOTICE OF MOTION

To above named Appellants, and to Messrs FLEMING, FRANKLIN & ALLMAN and Messrs PILLSBURY, MADISON & SUTRO, their Attorneys:

Notice is hereby given that above motion will be presented on June 17, 1929, at 10:30 am or as soon thereafter as it may be heard.

Dated: June 10, 1929

Signed: Above named Appellees
by P. H. B. KENT
and FRANK E. HINCKLEY
their Attorneys

Receipt this 10th day of June, 1929, of above Notice and of a copy of above Motion to Dismiss Appeal and of said Notice is hereby on the same date admitted.

Signed: Above named Appellants
by FLEMING, FRANKLIN & ALLMAN
and PILLSBURY, MADISON & SUTRO
their Attorneys
FLEMING, FRANKLIN & ALLMAN
PILLSBURY, MADISON & SUTRO
ALFRED SUTRO
By EUGENE M. PRINCE

Endorsed:
Filed Jun 10 1929
PAUL P. O'BRIEN,
Clerk

II POINTS AND AUTHORITIES ON MOTION TO DISMISS APPEAL

POINT ONE: THE PROCEDURE AND RECORD FOR APPELLANT PRESENT NO QUESTION FOR REVIEW

Appellant, in his brief, relies upon one and another part of the Transcript of Record indifferently of required procedure and practice for basis of appeal and without apparent care whether or not the appellate rules and decisions have been, in this case, observed. For instance, appellant relies upon parts of the "Decision and Judgment" which are plainly but opinion or comments of the trial court as if these parts were special findings. Bf 2, using Tr 50; and Bf 10-11, using Tr 38-40.

Appellant, further, has nowhere presented any question on the face of the record, offering to bring the same for review.

In *China Press v Webb,* 7 F 2d 581, 582, August 24, 1925, before this Circuit Court of Appeals, Circuit Judges Gilbert, Hunt and Rudkin, with opinion by Circuit Judge Hunt, all concurring, the law was stated in form that essentially and almost exactly applies to the instant appeal. The statement was:

> "The cause was tried to the court, which, after hearing the testimony, filed a written opinion entitled 'Decision and Judgment,' in favor of Webb. In his opinion, which covers 40 pages of the record, the judge makes an elaborate examination of the testimony, dividing his discussion into several parts, and at the conclusion of each part he finds 'as a fact from all the evidence,' etc. Judgment was entered, and the corporation brought writ of error.
>
> The assignments relied upon are based upon rulings upon evidence introduced upon the trial.
>
> The record fails to show that any exception whatever was taken until nearly 60 days after the judgment was entered. . . . Upon the trial there was no motion or request for special findings; nor at the close of the testimony was there a request for a finding on the issues; nor did defendant present to the trial court the question of law, whether there was substantial evidence to sustain the findings for the plaintiff below. The record therefore presents no question of the sufficiency of the evidence to support the judgment.
>
> *Penn. Casualty Co. v. Whiteway,* 210 F. 782, 127 C. C. A. 332;

Dangberg Land Co. v. Day, 247 F. 477, 159 C. C. A. 531;

Pederson v. United States, 253 F. 622, 165 C. C. A. 248;

Pennok Oil Co. v. Roxana Petroleum Co. (C. C. A.) 289 F. 416;

United States v. Union Stock Yards (C. C. A.) 291 F. 366;

Blumenfeld v. Mogi (C. C. A.) 295 F. 123;

Bank of Waterproof v. Fidelity Co. (C. C. A.) 299 F. 478.

The opinion of the trial judge with its several conclusions is not a special finding which authorizes this court to determine whether the facts found support the judgment.

Northern Idaho, etc., Co. v. Jordan Land Co. (C. C. A.) 262 F. 765;

Java Cocoanut Oil Co. v. Pajaro Valley Bank (C. C. A.) 300 F. 305.

At most the finding is a general one, having the same effect as though the case had been tried to a jury. We are therefore limited to a determination whether there is error apparent upon the face of the record.

Law v. United States, 266 U. S. 494, 45 S. Ct. 175, 69 L. Ed. 401,

and cases already cited.

. . .

It would seem to be a simple matter to conform to the established procedure and practice. To take an exception at the time of ruling of the court in the progress of the trial, and duly to present the same by a bill of exceptions and to prepare the record with the assignment of error,

are steps requiring no more formality in the course of a law action tried in the United States Court for China than in an action carried on in a federal court in another locality. It is evident that the statutes preserve that harmony of system contemplated by general statutes which are applicable and which have been judicially construed as controlling.

Dunsmuir v. Scott, 217 F. 200, 133 C. C. A. 194;

Warren v. Bromley (C. C. A.) 288 F. 563.

As no error appears on the face of the record, the judgment must be affirmed.

Affirmed."

China Press v Webb was followed in:

Wulfsohn v Russo-Asiatic Bank, 11 F 2d 715, 716

where this Circuit Court of Appeals, Circuit Judges Hunt, Rudkin and McCamant, with opinion by Circuit Judge Rudkin, said:

". . . After the close of the trial the court delivered its opinion in writing and gave judgment for the plaintiff below. Numerous errors have been assigned, and many questions of public and private law have been discussed in the briefs of counsel for plaintiffs in error; but many of the errors thus assigned are not open to review on the record brought here, because no request was made to the court at the close of the trial to find the facts specially, or to find generally, for the plaintiffs in error. In the absence of any such request, and a ruling thereon and an exception thereto, the general finding of the court stands as

the verdict of a jury, and an exception thereto presents no question for review.

This rule has been so often affirmed by this court that it is deemed scarcely necessary to refer to the authorities. However, see

China Press v. Webb (C. C. A.) 7 F. (2d) 581,

where the rule is held applicable to writs of error to the United States Court for China, and the cases there cited. The only questions subject to review, therefore, are rulings made during the progress of the trial, to which exceptions were reserved, and errors apparent from an inspection of the pleadings, process, and judgment."

China Press v Webb has also been followed in reported cases to date, including reports to 31 F 2d 1023 (31 F 2d complete), in:

Isaacs v DeHon, CCA 9, 11 F 2d 943, 944;

Thompson-Starrett Co v La Belle Iron Works, CCA 8, 17 F 2d 536, 539;

Lahman v Barnes National Bank, CCA 8, 20 F 2d 897, 899;

Gillespie v Hongkong Banking Corp, CCA 9, 23 F 2d 670, 671;

In the last cited case, before Circuit Judges Gilbert, Rudkin and Dietrich, opinion by Circuit Judge Rudkin, this Circuit Court of Appeals said:

"This is a writ of error to review a judgment of the United States Court for China in favor of the plaintiff, based on special findings of fact. The assignments of error are all based on the

insufficiency of the testimony to support some of the special findings, but the findings themselves were not excepted to, and the sufficiency of the testimony to support them was not challenged in the court below. On such a record it is firmly settled, if a question of practice and procedure can ever be settled, that there is no question before this court for review.

". . . A wealth of authority from other circuits might be cited, but, as already stated, the rule is too firmly established to admit of further controversy. Writs of error to the United States Court for China form no exception to the rule . . ."

We submit that in this appeal there is no question for review.

POINT TWO: FURTHER, AS TO BOTH REASONS STATED IN MOTION TO DISMISS APPEAL, APPELLANT (a) URGES NO ERROR THAT HAD BEEN ASSIGNED, (b) ACTUALLY, AND IN SELF-CONTRADICTION, IN HIS BRIEF, OPPOSES AND DENOUNCES AS CONTRARY TO LAW THE FIRST AND MAIN ERROR HE HAD ATTEMPTED TO ASSIGN

(a) The assignment of errors is printed in the brief at pages 7 to 9. Excepting this printing there is no reference whatsoever in the brief to this assignment.

Under Rules 11 and 24 of this Circuit Court of Appeals the assignment must be taken as abandoned by appellant and it may be disregarded by the Court.

(b) On a single page (page 7) of appellant's brief the opposed positions of appellant's counsel at Tientsin and San Francisco are shown. *At Tientsin*

the transaction was not of pledge, and the trial court was assigned error for holding the transaction to be of pledge. *At San Francisco the transaction is of pledge,* and the argument of the brief is that the trial court should have given the transaction a certain desired effect of pledge.

We read on page 7 of appellant's brief, referring to the decision of the trial court:

> *"It found that the flour mentioned in the documents held by the National City Bank had been delivered to the Warehouse Company in pledge, and also held the documents sufficient in form to constitute a valid pledge of the flour by the Trading Company to the Warehouse Company* (Tr. pp. 37-38)."

We also read on the same page 7, under the title "Assignment of Errors," "(Tr. pp. 66-68.)":

> *"1. That the United States Court for China erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and The National City Bank of New York was that of pledgor and pledgee (Decision and Judgment, pages 6 to 9, inclusive)."*

And counsel at San Francisco manifest elsewhere in their brief a predilection for designating the transaction one of pledge. At page 2, where they are paraphrasing the language of the Transcript, page 19,

"We have received *the goods* mentioned . . ."

counsel write,

". . . it had received *the pledged flour* . . .", italics ours. This change in language occurs again in counsels' brief at page 20, where the documents of

> ". . . *the pledged flour* . . . are warehouse receipts just as much as the "godown warrants" of plaintiffs."

In the heading of counsels' argument, page 9, the language is (italics ours):

> "The National City Bank, as assignee of *a valid pledge* made by the Trading Company to the Warehouse Company, and as holder of the Warehouse Company's receipts evidencing the deposit of the flour subject to *the pledge,* is entitled to participate ratably with the other receipt-holders in the distribution of the proceeds of the sale of the flour."

In view of the foregoing differences between counsel on trial and counsel on appeal,—differences that amount to direct antagonism,—the appellees, being in the fortunate position of a spectator to this conflict,—*tertius gaudens,*—but propose, by motion to dismiss, that the strife no longer continue in court.

B ALTERNATIVELY, REPLY BRIEF ON MERITS OF APPEAL

POINT ONE: APPELLANT, IN HIS BRIEF, ATTEMPTS TO HAVE THE CASE DEALT WITH AS IF IT HAD BEEN IN EQUITY, WHEREAS UPON ITS TRIAL AND IN ITS RECORD IT WAS AND IS AT LAW.

Appellant's brief opens with the statement:

"This is an appeal and *cross-appeal* from a *decree* (our italics) of the United States Court for China." Bf 1. For the cross-appeal appellant need not have spoken. For use of the word "decree" in referring to what the trial court designated the "Decision and Judgment" any justification is not ventured in appellant's brief. Neither is there any justification for the similar description at Bf 18:

> "4. A proceeding, like this proceeding, for the ratable distribution of a deficient quantity of warehoused goods, is in *equity* (italics ours), and all claimants must be made parties . . ."

or of the description at Bf 21:

> "Conclusion. We submit that the *decree* (our italics) denying The National City Bank a ratable proportion of the amounts realized from the sale of the flour is *inequitable* (again our italics) . . ."

All these words relating to equity first appear in this matter in appellant's brief. Upon the trial the action was at law. Both plaintiffs and defendant took it to be at law, and their respective parts in the transcript on appeal are prepared for appeal of an action at law. And the action was not, as appellant says, for "ratable distribution." The parties to the action had agreed upon distribution ratably to their ware-

house receipts. The sum for distribution was Tientsin currency $291,475.16, Tr 11, and all of this, it appears, has been distributed excepting $53,137.32. The latter amount the assignee, herein defendant, withheld and gave as his reason that one not a party to the action, namely the National City Bank, held documents that he, the assignee, regarded equivalent to warehouse receipts. Therefore the question was of the character of these documents offered as equivalent to warehouse receipts. Accordingly the action was laid in debt. This would oblige the assignee defendant to show from his "writings" that he was not indebted.

The documents of the Bank, unfortunately, had come to it by assignment from the defaulting warehouse company. The warehouse company and the trading company were causes of mistrust throughout the trial. The National City Bank chose to keep clear of them.

The Bank has, upon the face of things, kept clear also of the appeal. If the appeal were in equity, with privilege of *de novo* hearing and disposition finally, why should the Bank still stand apart? Appellant's brief, Bf 18-9, reads:

> "4. A proceeding, like this proceeding, for the ratable distribution of a deficient quantity of warehoused goods is in equity, and all claimants must be made parties . . .".

The same Bank, in another case brought from China, obtained reversal for non-joinder in an action at law.

> *National City Bank v Harbin Electric etc Co,*
> CCA 9, 28 F 2d 468, 470-1

The principles as to necessary parties are therefore present in appellant's mind excepting the vital principle that the *de novo* privileges sought by appellant in attempting to make out this action to be in equity obligate primarily the appellant to bring in the alleged necessary party, that is the Bank.

It is of course now much too late to transform into equity an action commenced at law. The action would have to be born again and to arrive at the appellate court embodied and clothed in an entirely different record.

In connection with the argument of appellant that this case was in equity citation is made of

Smith v Moors & Co, 215 Pa 421, 64 Atl 593.

This case was decided in 1906. To 1929, May, according to Shepard's Atlantic Reporter Citations, the case has not been cited as authority in any judicial opinion. The opinion in Smith v Moors & Co is loosely drawn. From it our opponents take a quotation from

Story, Equity Jurisprudence, 13th ed, Sec 754.

The quotation is incorrectly cited and erroneously quoted; besides the subject of which Justice Story is there speaking is the marshalling of assets of the estate of a deceased person! We should not expect to find in Story much law on warehousing. Even in

Langdell, A Brief Survey of Equity Jurisprudence, 1904-5

there are only some of the more fundamental principles. At page 86 Langdell says of the action of accounting in equity, and would, we believe, say the same of an action for "ratable distribution", that the

striking of a balance of account between the parties, like the distribution among these parties that had been agreed among them as having warehouse receipts, would defeat the action in equity.

> "The balance therefore necessarily becomes a debt, and can be recovered only as such. In ancient times such a balance was recovered by an action, called an action of debt for the arrearages of an account. In modern times it may be recovered by an action of debt or of *indebitatus assumpsit* upon an *insimul computassent* or account stated."

The period of heavier litigation as to grain warehouses and the legislation that culminated in the uniform warehouse receipts acts came much nearer our own times than the cases mostly cited by appellant.

Among all the cases brought here from the United States Court for China only one has been in equity.

> *Andersen, Meyer & Co v Fur & Wool Trading Co*, CCA 9, 14 F 2d 586, 589

The appellate procedure in that case was in no point objected to; it conformed to the equity rules. The case was before Circuit Judges Gilbert, Hunt and Rudkin, with opinion by Circuit Judge Gilbert; and the opinion reads at the page cited:

> "The statutes creating the United States Court for China make no provision for jury trials. The appellant participated in the trial without objection to the form of the action or to the jurisdiction. The trial would have been had in no different manner had it been regarded a law action, and the amount recoverable under the pleadings, the stipulation, and the evidence would have been the same in either form of action."

Appellant, upon arrival of the present case at San Francisco, exerts every effort to have the case taken as in equity. At Tientsin, however, the form was indifferent; and whatever preparations for appeal may have been in mind of trial counsel, the essentials of an equity appeal were not at all in mind.

O'Brien, Manual of Federal Appellate Procedure, ed 1929, 51-9

Yet the obligations as to appellate procedure are specified in the Act of Congress creating the court:

34 *St L* 814, Sec 3,

and from beginning to end the appellate courts at San Francisco have reasoned in their opinions and ruled upon no other subject so frequently. In the first in date of these appealed cases, one from Canton, China,

Steamer Spark v Lee Choi Chum, 1872, 1 Sawyer 713,

an attempt was made by most able counsel, eminent at the admiralty bar, Milton Andros, to have the vessel itself be appellant! Also, the record was but a mass of papers without those necessary to appeal. Appeal dismissed. The second case was from Hiogo (near Kobe), Japan, and its record also was fatally defective.

Tazaymon v Twombly, 1878, 5 Sawyer 79

In the present case there is a so called bill of exceptions, with no exceptions, and there is no statement of the case or other essential of an equity appeal. "The common-law bill of exceptions is not the proper way to present the evidence in an equity appeal."

Struett v Hill, CCA 9, 269 F 247, 249

If in equity, apart from face of the record, the deficiencies of the present appeal make it deserve to be dismissed.

POINT TWO: WHATEVER THE NATURE OF THE ACTION, APPELLANT'S RELIANCE, GENERALLY, UPON PROCEDURE AND RECORD WANTING IN EVERY REQUIREMENT, DEFEATS THE APPEAL

It is in actions at law that appellate review is upon its ordinary and main course. Other forms of action take their bearings from those at law, and their requirements are not thereby, as a rule, lessened but are made more imperative and exacting. In the present matter there is extreme or utter want of observing the requirements.

For extension of this argument and especially for quotation of authorities we desire to refer to our brief, printed above, on our motion to dismiss. The authorities there quoted are, mainly:

China Press v Webb, 7 F 2d 581, 582;

Wulfsohn v Russo-Asiatic Bank, 11 F 2d 715, 716

POINT THREE: RELYING UPON GRAIN WAREHOUSE CASES OF EARLIER PERIOD, APPELLANT IGNORES THE STATUTES THAT CONTROLLED, AND BOTH UPON TRIAL AND UPON APPEAL IGNORED THE STATUTES NOW CONTROLLING IN UNITED STATES JURISDICTION IN CHINA

The common law that the intermingling of fungible goods by a storage man who was originally a bailee made the transaction a sale and himself the buyer was changed by statute. The Minnesota statute is an example. Appellant's leading case is

National Exchange Bank v Wilder, 1885, 34 Minn 149, 24 NW 699

In his brief at Bf 14 he quotes from

Eggers v Hayes, 1889, 40 Minn 182, 41 NW 971

which refers to the case next before cited and quotes it. But appellant's quotation omits the sentence next preceding what he quotes. That sentence refers to the controlling statute that modifies the common law: it reads:

> "That part of the warehouse law of 1876—found in chapter 124, Gen. St. 1878—bearing upon this case has been construed in Bank v Wilder . . . In that case, which controls this. . . ."

That warehouse law was carried forward, as may be seen by tracing the judicial decisions, into

> *Minnesota General Statutes,* 1913, Sec 4490: "Delivery for storage a bailment — The delivery of grain to any warehouseman for storage, although it may be mingled with that of others, or shipped or removed from the original place of storage, shall be deemed a bailment, and not a sale."

This, then, is the statute, relating to grain, ordinarily fungible, which appellant seeks to apply to certain

designated brands of flour not fungible,—a statute of Minnesota for application in China!

Certain limitations of the Minnesota statute are of interest. We quote from

Torgerson v Quinn-Shepardson Co (Supreme Court of Minnesota) 9 Jan 1923, 201 NW 615, 616

"The storage of oats with an agreement to return equal amount in kind though not the identical oats deposited constituted a bailment. This is the direct declaration of the statute.

G. S. 1923, Sec 5078; *G. S. 1913,* Sec 4490

The statute changed the common law rule which made grain so deposited and intermingled a sale.

Nat. Ex. Bk. v. Wilder, 34 Minn. 149, 24 N. W. 699 . . ."

A glance at the texts of warehouse receipts in cases of this nature for nearly twenty years back from today shows instantly how elaborate the receipts are and how impossible of application even for illustration in the present case.

Besides, the particular Minnesota statute is a special statute entirely separate from the legislation known in Minnesota and many other States as the uniform warehouse receipts act.

The uniform warehouse receipts act was enacted by Congress also for the District of Columbia, and therefore, under

Biddle v United States, CCA 9, 156 F 759, 763

it is one of "the laws of the United States" in force in

the jurisdiction of the United States in China in accordance with

34 *St L* 814, Sec 4

The legislation for the District of Columbia does not appear to have provisions corresponding to the statute of Minnesota that appellant relies upon; neither does the entire series of appellate decisions in or relating to the District of Columbia have warehouse cases bearing upon the points in this connection. We suppose storage in the District of Columbia has seldom been of grain or, possibly, even of grain products. At least neither counsel at Tientsin nor counsel at San Francisco for this warehouse company has not invoked Acts of Congress or decisions of our appellate courts. Instead counsel select the various laws and decisions of various States. They do not persuade anyone what the law in China is. They are far from making a basis in law for this appeal.

POINT FOUR: THE TITLE CLAIMED THROUGH APPELLANT WAS DERIVED FROM THE WAREHOUSE COMPANY WHICH HAD NO TITLE TO GRANT

On the face of the record it is clear, and it is the most outstanding feature of the case, that the Chinese trading company and the nominally American incorporated warehouse company together had been perpetrators and agencies of the perpetrators of stupendous fraud, and that the banks, Chinese and American, as victims of fraud, desired to clear themselves from

accounts as directly as possible. The banks agreed on common action, assuming their documents were warehouse receipts, all documents relating to specific brands of flour. They found afterwards that the American bank had documents that differed. The bank described its documents as "godown warrants or trust receipts". These are not the same. In China, as it is commonly known, they are very different, and one of them is exclusive of the other. Five of the six of the American bank's documents related to no specific brands, and the sixth related in one half of the specified flour to a brand of flour that had not come into possession of the assignee. At least one of the Chinese banks held a warehouse receipt that specified flour of a brand that had not come into possession of the assignee, and this bank, although the amount of the flour was large, had withheld from making any claim on basis of that receipt. The American bank, however, not only claimed generally on unspecified flour as to five documents, but for two lots of supposedly stored flour claimed by documents of two different and mutually excluding natures both dated the same date and not referring one to the other, the warehouse company issuing to the bank a warehouse receipt for goods of which it was not owner. These facts are shown in the pleadings and are basis of the judgment. They are facts which make it difficult, under most liberal consideration, to find any merit in the appeal.

The appellees, therefore, respectfully presenting all the foregoing reasons:

1 That the case is at law;

2 That no procedure or record for review was made;

3 That sundry laws of various States are not "the laws of the United States" applicable in China;

4 That appellant's claim had no lawful origin;

applies to the Honorable the Circuit Court of Appeals to affirm the judgment appealed from, with costs.

Dated, San Francisco,
June 15, 1929

Respectfully submitted,
P. H. B. KENT,
Barrister at Law
FRANK E. HINCKLEY,
Attorneys for Appellees and Cross-Appellants

No 5687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

vs

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants

PETITION FOR REHEARING FOR APPELLEES AND CROSS-APPELLANTS

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Subject Index

Cases Cited, and Other Authorities Referred to

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Appellees and Cross-Appellants

PETITION FOR REHEARING FOR APPELLEES AND CROSS-APPELLANTS

To the Honorable William B. Gilbert, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Chinese Banks, appellees and cross-appellants herein, are grievously injured by the appellate decision of general reversal. They respectfully petition for rehearing. They represent that:

I The Supreme Court, with opinions by Chief Justice Taft and Justice Brandeis, in two cases resembling the case at bar and where the question was whether the parties had had pleading, procedure, adjudication, and appellate record and adjudication to which they were entitled in equity, reversed and remanded rather than of itself adjudicate on the merits.

II The Chinese Banks, appellees and cross-appellants, are entitled in equity at least to amend their pleadings, and with knowledge that they are proceeding in equity, to produce evidence in points where the construction of the National City Bank's documents cannot be determined from the documents themselves, and to have adjudication in the trial court.

I

The opposed interests in this action were the Chinese Banks on one part, the National City Bank of New York on the other. Both had agreed together, it is obvious, to have the assignee of the insolvent warehouse sell what flour came into his possession upon the assignment and distribute the net proceeds proportionately to the warehouse receipts both held. It turned out that the National City Bank had no warehouse receipts. The assignee, however, accepted other documents from the National City Bank in

place of the warehouse receipts, and he was prepared to distribute upon them. Then the Chinese Banks sued for the entire net proceeds. Judgment was for the Chinese Banks except with respect to a portion of flour specified in one of the documents of the National City Bank. That excepted portion caused the cross-appeal.

One fact stands out: When this action commenced, the usual functions of equity in warehouse insolvencies had already been done and cleared away; and there remained to determine only the legal effect of the substitutd documents of the National City Bank. *Neither party sought equity. The trial court in a thorough-going opinion made not the slightest reference to equity.* THE ACTION WAS FIRST ATTEMPTED TO BE CHANGED FROM LAW TO EQUITY THROUGH SKILL OF APPELLATE COUNSEL AT SAN FRANCISCO IN THEIR OPENING BRIEF FOR APPELLANT.

This outstanding fact, that equity had been unsought by either party because the benefits of equity had already been secured to each of them, we are obliged to believe will be given deserving weight in considering the present petition. And in this connection the Chinese Banks desire to free themselves entirely from the inference that of themselves or, through their attorneys they have conceded the action to be equitable in nature or object. Such inference appears to be ascribed to them in the following language of the appellate opinion:

"In this decision the court below adopted the general rule that where goods belonging to different persons are so intermingled as to be indistinguishable,

whether by consent of the owners or by wrongful act of the depositary, the owners become tenants in common of the mass, and if a part of the commingled property is lost or misappropriated by the depositary, all owners must bear the loss *pro rata*. All parties to the appeal concede the correctness of this rule as a general proposition of law." Infra, Appendix iii

Search of the record and briefs clearly disassociates the Chinese Banks and their attorneys from the proposition mentioned, and particularly from the implication that equitable distribution was thereby admitted by them to be the nature and object of the action they brought. *The foregoing language of the opinion is almost word for word that of appellant's attorneys at San Francisco.* Aplts Brief, p 9; and Reply Brief, p 3. At the place cited first appellant's attorneys, where they are opening their main argument, say:

"So far as concerned the rights of plaintiffs as holders of godown warrants, the trial court applied the general rule that where goods, either by the consent of the concerned or wrongfully by a depositary, are so intermingled as to be indistinguishable, the holders are tenants in common of the mass, and if a part of the mingled property is lost or is misappropriated by the depositary, all the owners bear the loss *pro rata*. This general proposition is not in dispute and is well settled." (No citation to the record)

Turning to the opinion of the trial court, we find, however, the court says, with reference to questions of law discussed in the briefs of counsel:

"I have not deemed it necessary to go into those questions in this opinion, for the simple reason that in their last analysis they all come down to the question as to whether the National City Bank is the holder of *evidences of title* to this flour [italics in original] which are in legal effect the equivalent of warehouse receipts. I have no difficulty in reaching the conclusion that five of the transactions, all of which are similar to the one illustrated by Ex. 1, do not as a matter of law place the bank in the position of a holder of warehouse receipts." Transcript of Record, p 40.

It will be noted also that appellant's attorneys restricted their statement, saying:

"So far as concerned the rights of plaintiffs as holders of godown warrants, the trial court applied the general rule . . ."

The appellate court, however, strikes out the restriction. The result follows that the remainder of the opinion proceeds as if there were a large number of claimants,—as if notice had been published bringing in all claimants in usual warehouse insolvency proceedings, and as if equity must have been resorted to for accounting and adjustment of a multitude of claims. That was not at all the case. *The equity features had all been disposed of by consent of the two parties.* One party had warehouse receipts, the other assignments of pledges. Were the assigned pledges legally equal to the warehouse receipts? The parties and the trial court proceeded in an action at law. The party holding assigned pledges lost. He appeals at law. It was not for him to choose the form

of action below, for he was the defendant. He proceeded without objection to the form of action the plaintiffs had chosen. But appellate counsel argue, and the appellate court decides, that the action had to be and was in equity.

On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit in

Twist et al v Prairie Oil & Gas Co, 274 US 684, 686, 689-90, 692; 71 L ed 1297, 1299, 1301-2

the Supreme Court, with opinion by Mr Justice Brandeis, reversing the decision below, said:

> The Circuit Court of Appeals "had before it for review, on appeal and cross appeal, a final decree in equity of the district court for Eastern Oklahoma. The case had been heard by the trial court on the evidence as a suit in equity; and had been treated as such in both courts by both parties. The court of appeals concluded that the trial court did not have jurisdiction in equity; ruled of its own motion, that the case must be deemed to have been tried below as one at law on an oral waiver of jury; and that, since there had been no waiver filed . . . and no bill of exceptions or special findings of fact . . . the appellate court could not consider the errors assigned by the parties. It, therefore, affirmed the judgment on the pleadings. . . .
>
> "In federal courts, as in others, a plaintiff has a right to choose whether he will seek to enforce a legal or an equitable cause of action and whether he will seek legal or equitable relief. He makes his election and proceeds at law or in equity at his peril. . . . Formerly, if a plaintiff in a federal court sued in equity and the objection that there was a plain, adequate and complete remedy at law was sustained, the bill was necessarily dismissed. . . . And ordinarily the dismissal was required to be without prejudice to an action at law . . .; though possibly such

precaution was unnecessary. Now, under the Act of March 3, 1915, chap. 90, § 274a, 38 Stat. at L. 956, U. S. C. title 28, § 397, and Equity Rules 22 and 23, if the suit was improperly brought in equity, either the trial court or the appellate court may transfer the case to the law side. . . .

"The parties cannot, of course, compel the trial court to hear in equity a suit which seeks a legal remedy for a legal cause of action. . . . Nor can the task of reviewing such a case as if it were actually an equity cause be imposed upon the appellate court through consent of the parties. . . . Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction. . . . But that objection, whether taken in the trial court or in the appellate court, does not go to the power of the court as a federal court.

. . .

"The court of appeals, being of opinion that the plaintiffs had not established a right to relief in equity, because there was a plain, adequate and complete remedy at law, might, on the undisputed facts, have reversed the decree on that ground without considering the specific errors assigned; and, rightly or wrongly, it might have ordered the bill dismissed without prejudice to the remedy at law; or might conceivably have ordered the case transferred to the law docket; or might have considered the case on the merits as an equity appeal, in the view that at such stage of the proceedings it was desirable to hold that the objection to the equity jurisdiction had been waived. . . . But it could not, while refusing to consider the errors assigned, retain the case and adjudicate the merits. This it did when it affirmed the decree. *It was error to declare that this proceeding, which is a bill in equity in its nature as well as in its form, and which seeks relief that only a court of equity can give . . ., shall be deemed an action at law, because the only remedy open to the plaintiffs was at law.* . . . (italics not in original)

. . .

"Because the Court of Appeals should have considered the errors assigned as in an equity cause but did not, we reverse its judgment and remand the case to it for further proceedings in accordance with this opinion. . . . Reversed."

We admit that the rule differs, on present authority, where an equity suit is erroneously tried at law, and that the error may then be treated as harmless if the appellate court is satisfied that the proper result was reached.

Great American Insurance Co v Johnson, 25 F 2d 847, 849 (Key Titles 7 and 8); and opinion on petition for rehearing, 27 F 2d 71 (Key Title 1); *Liberty Oil Co v Condon National Bank,* 260 U S 235, 240-5; 67 L ed 232, 235-7, opinion by Mr Chief Justice Taft

We are aware also of the holding of this Circuit Court of Appeals in

Andersen, Meyer & Co v Fur & Wool Trading Co, 14 F 2d 586, 589 (Key Titles 3-5)

where appellant had denied the sufficiency of the petition to sustain the decree or to warrant equitable relief and had asserted that the action should have been at law, and where the court said:

"But the final answer to both objections is that neither of them can be held ground for reversal here, for the court below had jurisdiction of the cause of action on one side or the other, whether at law or in equity. The statutes creating the United States Court for China make no provision for jury trials. The appellant participated in the trial without objection to the form of action or to the jurisdiction. The trial would have been had in no different manner had it

been regarded a law action, and the amount recoverable under the pleadings, the stipulation, and the evidence would have been the same in either form of action."

What makes strong distinction in favor of the Chinese Banks in the present case is that fatal deficiency of appellant's record on appeal brought before this Circuit Court of Appeals:

> *Only the complaint and its attached exhibits,*
> *the answer,*
> *the reply,*
> *the judgment for plaintiffs* (which cannot include comments on evidence and on the law).

So far as could benefit appellant this record was dead at its birth. The pleadings alone could not have matured into a judgment in the trial court. How could they on appeal?

> *O'Brien, Manual of Federal Appellate Procedure,* ed 1929, 51-9, and particularly 57-8

How could this Circuit Court of Appeals, in the light of above cases, its own and those of the Supreme Court, as Mr Justice Brandeis said:

> "while refusing to consider the errors assigned (in the present case no attempted assignment of errors having been relied upon), retain the case and *adjudicate the merits*"?

. . .

That "equality is equity" in equitable distribution of assets is the single and solitary maxim of equity in-

voked by appellant and adopted by the appellate court.

Of other maxims it would seem at least two might here apply: "He who comes into equity must come with clean hands"; "Equity aids the vigilant, not those who slumber on their rights". For reason to apply the "clean hands" maxim we would refer to the discerning analysis of the situation which is contained in the dissenting opinion; and it might additionally be observed, as was done in the oral argument for appellees, that the one document put into evidence for defendant, and with which the others are said to be of like legal standing, all six being described as assigned pledges, bears upon its face the unmistakable marks of invalidity and we, reluctantly think, of fraud. And as to the maxim "equity aids the vigilant", the dissenting opinion, as well as the prevailing opinion, observes that the really interested party, the National City Bank, has not openly or actively come into or been brought into this action. Can the answer, as a pleading, be said to be "vigilant"?

The equity maxim that is exclusively used,—"equality is equity",—we think is too broadly, and it certainly is one-sidedly used. If the Latin is the original maxim, as it probably is, the translation by Judge Story is wrong. No learning need be assumed for anyone to say that of course the translation should be: "Equity is of the nature of equality". And it is unreasonable to say that "equality is equity" for that means that equity has no other element than equality. "I need hardly repeat", said Lord Esher, Master of Rolls, in

Yarmouth v France, 19 QBD 647, 653,
"that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

Or if we take "equality is equity" for the broad value it generally connotes, how can it apply here? Let us quote all that is said of it in the text of Corpus Juris under the title of Equity:

> "[§207] M. Equality Is Equity. The maxim that equality is equity expresses an ancient equitable principle of wide and general application. The meaning of this maxim is that in the absence of relations or conditions requiring a different result, equity will treat all members of a class as upon an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences. The maxim is restricted in its application to situations or conditions where the parties are on the same footing. It is also restricted by the maxim that equity follows the law; and by the maxim that where equities are equal the first in order of time must prevail. But the presumption is in favor of equality of rights; a right to a preference must be proved. The rule that those who share in benefits must contribute proportionately to the expenses is an application of this maxim." *21 CJ 206*

To apply here the maxim must pass the two restrictions mentioned:

1 *The parties must have been found on the same footing;*

2 *Equity follows the law.*

The trial court, directly in contact with the evidence and in a thorough-going examination of the evidence and reasoning of the law, said:

> "I have no difficulty in reaching the conclusion that five of the transactions, all of which are similar to the one illustrated by Ex. 1, do not as a matter of law place the bank in the position of a holder of warehouse receipts." *Transcript of Record,* p 40

For the second restriction, equity follows the law, we limit the argument to a judgment of this Circuit Court of Appeals which has proved the most fundamental of all judgments relating to United States jurisdiction in China,

United States v Biddle, 156 F 759.

This judgment is foundation for applying in China to American defendants the Acts of Congress of general nature enacted for jurisdictions as to which Congress has exclusive jurisdiction and which, as required by Acts of Congress,

Revised Statutes, Sec 4086; 22 *USCA* 145

are suitable to be applied and necessary for giving the treaties effect. It can be shown, for example, that incorporation statutes for the Territory of Alaska and for the District of Columbia are of doubtful application and questionable necessity: and the attempt to apply them was early abandoned. A warehouse regulating statute enacted for the District of Columbia would be, for like reason, probably inapplicable. The Uniform Warehouse Receipts Act, on the other hand, would probably be, at least in important parts, applicable, the reasoning in *United States v Biddle* leading to that conclusion. The warehouse business in the

United States is mainly authorized and controlled by the several States of the Union, and their statutes, except as to the Uniform Warehouse Receipts legislation, differ in marked respects. The particular warehouse at Tientsin that defaulted in this case was supposed to be a State of Delaware corporation. The State of Delaware of course could effect no control whatsoever of the ordinary course of business of that warehouse. Was the law applicable to its astounding defaults merely the common law? Was it a law conglomerate of State laws? Has counsel for appellant anywhere relied upon the now elaborately developed State laws of warehousing? No, counsel has relied upon cases most of which the jurisprudence relating to warehousing has passed far beyond. The straight, thorough reasoning of the trial court in the part of its opinion relating to pledge of specific goods, counsel diverts attention from by pointing to generalities about equity. If equity follows the law, that is accepts as controlling it the Act of Congress in the Uniform Warehouse Receipts Act establishing the requisite form and contents of warehouse receipts, could the supposed pledges rank equally with the admittedly valid receipts? They could not under *United States v Biddle* as decided by this Circuit Court of Appeals.

II

Federal equity procedure is no less integral than that at law. It is a special procedure adapted from

the main line of procedure at law. Its requirements are not diminished but rather increased over those of the law. If federal courts have authority to conform in law actions (though not for record on appeal) to procedure established by local State courts, they have no such authority in equity procedure. The United States Constitution maintains equity distinct from law, and the Supreme Court of the United States establishes Equity Rules for all courts of the United States having equity jurisdiction. The United States Court for China has equity jurisdiction, and with the provision of the statute for review "in all cases" from the Court for China, and the provision of the statute for further review in the Supreme Court, there exists a unity and harmony of procedure in equity even stronger and more dominant than at law.

Constitution, Art III, § 2, Subdiv 1;
China Press v Webb, 7 F 2d 581, 583

We are most unwillingly constrained to believe, and the plain result must be, that *if the present decision on appeal in*

McDonnell v Bank of China

stands, *any equity matter coming to this Circuit Court of Appeals from China will loosen and slip in procedure and record to hopeless extent.* What procedure and record from China has less merited the patience of this appellate court? What character can equity appeal from China hereafter have? What benefits from the present decision will equity trials in China show? What standing will equity maintain as compared with law?

Toeg et al v Suffert, 167 F 125

In this connection we have very attentively read the opinion of Mr Chief Justice Taft in

Liberty Oil Company v Condon National Bank,
260 US 235, 240-5; 67 L ed 232, 235-7

The opinion in its entirety bears upon our case so closely that we should quote it *in extenso* but for *the desire we have that it be read directly from the reports.* It will be observed the action began as an action at law for money had and received. The defendant bank claimed to be only a stakeholder and asked that other claimants of the fund be made parties and prayed for affirmative equitable relief in the nature of a bill for interpleader. Under Equity Rule 22 a suit in equity which should have been brought at law must be transferred to the law side of the court; but no corresponding rule or statute expressly directs that a law action which should have been brought on the equity side be transferred thereto, although *the Supreme Court here expresses the view that power so to transfer is implied in the broad language of Section 274b of the Judicial Code.* The interpleader in equity made the case one of equity, and *it should have been treated as in equity both on trial and on appeal.* We now quote at 260 US 244:

> "It was, therefore, error by the circuit court of appeals to proceed as if it were reviewing a judgment in a suit at law upon a bill of exceptions. It is true the record contained a bill of exceptions, but there was also a transcript of the same evidence, certified as required in appeals in equity."

Referring to Judicial Code §§ 269 and 274b, the Supreme Court noted that the appellate court is given

full power to render such judgment upon the record as law and justice shall require.

> "On this review by certiorari, we could consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. [271 F 928] On such an issue alone, however, we could not have granted the writ, because, except for the important question of practice, the case was not of sufficient public interest to justify it. We think it better, therefore, to reverse the judgment of the Circuit Court of Appeals, and to remand the case to that court for consideration and decision of the issues of fact and law in this case as on an appeal in equity."

The Equity Rules had been complied with in preparing the case for review. THEY HAD NOT BEEN COMPLIED WITH IN THE CASE FROM CHINA.

> "The plaintiff below was evidently not certain of the proper practice, and *prepared for either writ of error or appeal.*" (The report as cited, page 245, top)

In the case from China the appellant, it is plain, made his answer, carried on in the trial, and, having judgment against himself, brought the case for review without regard for the requisites whether in equity or at law. In contrast, the appellees were diligent in preparing their case for trial and regardful of observing the requirements of procedure leading to review. Yet, taken by surprise in the appellate court, with the contention that the case had actually been in equity, they stand, under the appellate court's decision as if their complaint below had been outright dismissed without right to plead or to present for trial an issue in equity.

The Chinese Banks, appellees and cross-appellants herein, for the reason that they are entitled in equity to have benefit of proceedings in equity, respectfully and earnestly petition for remand, with instructions, to the trial court.

Dated, San Francisco,
August 14, 1929

Respectfully submitted,
P. H. B. Kent
Frank E. Hinckley
Attorneys for Appellees and Cross-Appellants

Certificate of Counsel

The undersigned, who is of attorneys for petitioners herein, hereby certifies that in his judgment the foregoing petition for rehearing is well founded, and he further certifies that said petition is not interposed for delay.

Dated, San Francisco,
August 14, 1929

Frank E. Hinckley
Of Attorneys for Petitioners

Appendix.

without marks, except the brands on the bags, and without anything to indicate that any portion of the flour belonged to any particular person. He further discovered that against this quantity of flour there were outstanding warehouse and other receipts calling for the delivery of upwards of 1,000,000 bags. Of this quantity the plaintiffs in the court below held godown warrants, or warehouse receipts, for 996,500, and the National City Bank of New York a godown warrant and other receipts for 161,000. By consent of all parties in interest, the assignee sold the flour on hand for approximately $300,000 in Tientsin currency. He then formulated a plan for the ratable distribution of the proceeds of the sale among all receipt holders in proportion to the number of bags of the various brands of flour called for by their respective receipts. Under this plan of distribution there was allotted to the National City Bank the sum of about $53,000 and the balance, less expenses, was allotted to the plaintiffs. The plaintiffs not being satisfied with the allotment made to the National City Bank brought the present suit in the court below against the assignee to recover the entire proceeds of the sale. The defense interposed by the assignee was a partial one only, setting up the claim of the New York City Bank to the sum of approximately $53,000, allotted to it under the proposed plan of distribution. The court below reduced the allotment to the New York City Bank to the sum of approximately $6,600, subject to a further deduction of approximately $3,300 in the event that no flour of a particular brand came into the possession of the defendant as assignee. A judgment or decree

was thereupon entered awarding to the plaintiffs the entire proceeds of the sale less the amount awarded to the New York City Bank and less the expenses of the assignee. From this judgment or decree both parties have appealed.

In this decision the court below adopted the general rule that where goods belonging to different persons are so intermingled as to be indistinguishable, whether by consent of the owners or by wrongful act of the depositary, the owners become tenants in common of the mass, and if a part of the commingled property is lost or misappropriated by the depositary, all owners must bear the loss *pro rata*. All parties to the appeal concede the correctness of this rule as a general proposition of law.

Before taking up the merits, we must dispose of a contention made by the appellees and cross-appellants to the effect that this court cannot consider the sufficiency of the evidence to support the findings or judgment under its decisions in China Press v. Webb, 7 F. (2d) 581, Wulfsohn v. Russo-Asiatic Bank, 11 F. (2d) 715, and Gillespie v. Hongkong Banking Corp., 23 F. (2d) 670. The contention is well taken if this was an action at law: but the proceeding was equitable in its nature and objects. It was a proceeding against a trustee or assignee for the equitable distribution of a fund in his hands, and it is well settled that such a proceeding is properly instituted in a court of equity. As said by the court in Dows v. Ekstrone, 3 F. 19:

> "When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to

> each depositor, fraudently disposes of part of the wheat, the receipt holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting. No one of such receipt holders can recover at law the whole, nor could any number of such holders, less than the whole number, recover possession as against the remainder. This case must be brought in a court of equity, where all the claimants can be heard and decree can be rendered establishing the rights of each with respect to the property in controversy."

And to such a proceeding it would seem that the New York City Bank was an indispensable party; but that objection was not urged in the court below, nor is it particularly urged in this court. National City Bank v. Harbin Electric Joint-Stock Co., 28 F. (2d) 468.

We come now to a consideration of the merits. The only claim in controversy is the claim of the New York City Bank, and that claim is based on six separate and distinct transactions, all of which are similar in form, except one which was later accompanied by a warehouse receipt, and is for that reason more favorable to the appellant than the remaining five. We will refer to one of the transactions as illustrative of the others. April 5, 1927 the Union Trading Corporation executed its promissory note payable to the order of the Warehouse Company for the sum of $80,000, Tientsin currency, with interest at the rate of ten per cent per annum, and deposited with the Warehouse Company as collateral security for the payment of the loan 40,000 bags of flour of two different brands and 60 bales of gunny bags containing

400 bags each. This note was apparently discounted by the National City Bank of New York and the Warehouse Company gave the bank the following receipt: "We have received the goods mentioned in this instrument and we will hold them to the order of the National City Bank of New York, and we hereby transfer all our rights under this instrument to the National City Bank of New York." The court below held that these instruments conferred no rights on the appellant as against the holders of warehouse receipts, unless the appellant was able to identify the flour that came into the possession of the assignee as the identical flour delivered in pledge. This, of course, the appellant, like other claimants, was unable to do. The correctness of this ruling is the question for decision here. The first question is, was there a valid pledge in the first instance. Two things are essential to constitute a pledge. First, possession by the pledgee, and, second, that the property pledged be under the power and control of the creditor. Casey v. Cavaroc, 96 U. S. 477. The transaction between the Union Trading Corporation and the Warehouse Company satisfied these requirements. Whether the property pledged could be identified or was part of a general mass at the time the pledge was made, is not disclosed by the record, nor do we deem that fact material so long as the pledgee had possession of the whole. Weld v. Cutler, 2 Gray 195; Hibbard v. Merchants' Bank of Detroit, 11 N. W. 834.

In the latter case Judge Cooley said:

> "Undisputed authorities bring the legal controversy within very narrow compass, and render

general discussion needless. We have already said that it is conceded a warehouseman may transfer title to property in his warehouse by the delivery of the customary warehouse receipt. In such cases there is no constructive delivery of the property whereby to perfect the sale except such as is implied from the delivery of the receipt; and when the property represented is only part of a large mass as was the case here, there could not well be any other constructive delivery. But for the convenient transaction of the commerce of the country, it has been found necessary to recognize and sanction this method of transfer, and vast quantities of grain are daily sold by means of such receipts. . . . We are then to see whether a constructive transfer of possession that is recognized in the case of sale shall be held inoperative in case of an attempted pledge.

"If a distinction is made in the cases it ought to be upon some ground that would seem reasonable in commercial circles, where men may naturally be expected to be familiar with the ordinary methods of doing business but not with technical rules for the government of special cases. For business purposes rules should as far as possible be general, for the very satisfactory reason that special exceptions not made upon obvious reasons are not likely to be understood or observed. And the special exception supposed to exist in this case would be peculiarly liable to mislead if it were recognized. If a merchant may buy grain in store and receive a transfer of title in a warehouse receipt, he should be very likely if he had occasion to receive grain in pledge, to suppose a similar receipt to be sufficient for that purpose. No reason would occur to him why it should be otherwise, and this because there would in fact be no reason except one purely technical depending on nice legal distinctions. When that is found to be the case any proposition to establish a distinction should be rejected, decisively and without hesitation; for the laws of trade are made and

> exist for the protection and convenience of trade, and they should not tolerate rules which have the effect to border the chambers of commerce with legal pitfalls."

As long as the Warehouse Company held the note of the Trading Corporation, it will be conceded that it could assert no right as pledgee in any of the flour in storage as against the holders of warehouse receipts where there was not sufficient flour in storage to meet the demands of all. 27 R. C. L. 979. But when the Warehouse Company attorned or transferred its right in the pledged property to the appellant, a different situation arose. For while prior to the transfer the Warehouse Company held the pledged property in its own right, after the transfer it held it as agent or bailee for the transferee. It may be conceded that the relations existing between the Warehouse Company and the holders of outstanding warehouse receipts was somewhat different from the relation existing between the Warehouse Company and the appellant, but in the absence of some statute giving a priority of right to the holders of warehouse receipts, we are of opinion that the several claimants stand on an equal footing in a court of equity.

> "Thus in equity it is a general rule that equitable assets shall be distributed equally and pari passu among all the creditors without any reference to the priority or dignity of the debts; for courts of equity regard all debts in conscience as equal jure naturali and equally entitled to be paid; and here they follow their own favorite maxim that equality is equity: 'Aequitas est quasi aequalitas.' And if the fund falls short, all the creditors are required to abate in proportion."
> 2 Story's Eq. Jur., 14 ed., sec. 754.

See also Eggers v. Hayes, 41 N. W. 970; Union Trust Co. v. Wilson, 198 U. S. 530. The decree must therefore be reversed.

Inasmuch as the court below left undetermined the question whether any flour of a certain brand came into the possession of the assignee, a final decree cannot be entered here. That question should be determined, however, in advance of any final decree. The case will therefore be remanded to the court below for further proceedings not inconsistent with this opinion.

DIETRICH, C. J. dissenting:—

I am unable to take the view that there should be a reversal upon the assignee's appeal. He, of course, has no real interest and can be recognized only as representing the National City Bank. For some reason, not disclosed, that institution has not seen fit to appear, by intervention or otherwise, and thus become bound by any judgment that may ultimately be entered. Admittedly it holds no formal godown warrants or warehouse receipts. I agree that mere form is not controlling and that, with informal documents resting upon the fact of actual warehousing, it should be given a footing with the holders of formal receipts. But under commercial usage and the law a formal warehouse receipt, like more common negotiable instruments, carries certain presumptions, and its production establishes for the holder a prima facie case. Such presumptions I do not think attend the docu-

ments here produced on behalf of the National City Bank. Ordinarily a warehouse receipt imports an obligation of the warehouse company, and thus being against interest, it may be presumed to have been issued only for goods actually received. Here there was no such safeguard. The certificate or document relied upon as a warehouse receipt was issued by the Warehouse Company, in the furtherance of its own interests. It wanted the bank's money and could get it only by executing such a paper. In the ordinary case of warehousing, the warehouse company would have no incentive to falsify the facts by issuing a receipt for goods it did not actually receive; here by issuing a false receipt it would be able to get the bank's money. Though without a formal receipt the bank here offered no evidence that the actual facts were such as to justify the issuance of such a document. Not only did the assignee, who, having possession of the records of the Warehouse Company, presumably was in a better position than any other party to the suit to make proof, fail to offer any evidence, but he resisted the efforts of appellee, affirmatively to show that the Company had never received the flour. No explanation is offered of the circumstances surrounding the transaction with the bank, and no evidence even of its date. While in the briefs it is argued that the bank should be protected as a holder in good faith, it did not see fit to disclose to the court the facts from which it would appear to be such a holder. In the opinion of the majority it is said: "As long as the Warehouse Company held the note of the Trading Corporation, it will be conceded that it could assert

no right as pledgee in any of the flour in storage as against the holders of warehouse receipts where there was not sufficient flour in storage to meet the demands of all. 27 R. C. L. 979. But when the Warehouse Company attorned or transferred its right in the pledged property to the appellant, a different situation arose." But there is no evidence other than the self-serving certificate that the Warehouse Company had on hand any of the supposed flour when it dealt with the bank. And if, as stated in the majority opinion, it could assert no right against other holders of warehouse receipts, if at the time it dealt with the bank "there was not sufficient flour in storage to meet the demands of all", how could it transfer to the bank a right it did not possess? We know only that on August 1st, 1927, there were in the warehouse 91,666 bags of flour, against which there were outstanding regular receipts for 996,500 bags. Are we to presume that a short time prior to that date, when the Warehouse Company gave to the bank the certificate or acknowledgment (the precise date of which is not shown) it had in its possession more than a million additional bags?

I think the decree should be affirmed, with the exception only that as suggested in the last paragraph of the majority opinion, the court below should be directed to make a finding on the undetermined question there referred to.

(Endorsed): Opinion and dissenting opinion, filed July 15, 1929

Signed: PAUL P. O'BRIEN, Clerk

No. 5688

United States

Circuit Court of Appeals

For the Ninth Circuit.

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION, LTD., a Corporation,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, His Wife,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5688

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

LE ROY ANDERSON, Esq., Prescott, Ariz.,
LEO T. STACK, Esq., Prescott, Ariz.,
Attorneys for Plaintiff (Appellee).

SLOAN, HOLTON, McKESSON & SCOTT, Fleming Bldg., Phoenix, Ariz.,
EDWIN GREEN, Esq., Fleming Bldg., Phoenix, Ariz.,
Attorneys for Defendant (Appellant).

In the Superior Court of the State of Arizona, in and for the County of Yavapai.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD.,
Defendant.

COMPLAINT.

Come now the plaintiffs above named and for their cause of action against defendant, allege:

I.

That plaintiffs are residents of Yavapai County, Arizona, and at all of the times herein mentioned have been and now are husband and wife; that de-

fendant, so plaintiffs are informed and believe, is a Scottish corporation, duly qualified and licensed to do and transact the business of an indemnity insurance company in the State of Arizona.

II.

That on the 2d day of July, 1927, and for a long time prior thereto, one George Ross was duly licensed and permitted by the Arizona Corporation Commission, under the provisions of Chapter 130 of the Session Laws of Arizona, 1919, and acts amendatory thereof and supplemental thereto, to carry on and conduct a taxi service business in the City of Prescott, County of Yavapai, and vicinity, and owned, maintained, used and operated in connection therewith one certain Paige Sedan automobile.

III.

That in order to qualify for said license, and as one of the conditions therefor, said George Ross was required to and [1*] did obtain and file with the Arizona Corporation Commission one certain policy of indemnity insurance duly written and issued by defendant by which said policy defendant did insure and agree to indemnify said George Ross against loss by reason of any liability imposed by law upon said George Ross for damages on account of bodily injuries suffered by any person by reason of the ownership, maintenance or use of said Paige Sedan; and to defend in the name and on behalf

*Page-number appearing at the foot of page of original certified Transcript of Record.

of said George Ross any suits brought against him on account of any such happenings.

IV.

That in conformity with the orders of the Arizona Corporation Commission duly adopted and promulgated under said Chapter 130 defendant was required to and did attach to said policy of indemnity insurance a special rider or clause whereby defendant agreed, in consideration of the premium at which said policy was written, and its acceptance by said Arizona Corporation Commission as a compliance with said Commission's orders, that, any provision therein contained to the contrary notwithstanding, said policy should inure to the benefit of any or all persons suffering loss or damage, and that if final judgment is rendered against said assured by reason of any loss or claim covered by said policy defendant would pay said judgment to the plaintiff securing the same upon demand. That said Arizona Corporation Commission duly accepted and approved said policy of indemnity insurance with said special rider or clause attached thereto, as aforesaid, as a compliance by said George Ross and defendant with the rules, regulations and orders of said Commission, and said policy was in full force and effect for the period of one year beginning with the 5th day of February, 1927.

V.

That on the 2d day of July, 1927, at the City of Prescott, said George Ross, while engaged in the conduct of [2] said taxi service business and

while acting within the scope of his said license and permit, and within the terms, provisions and conditions of said policy of indemnity insurance, and while in an intoxicated condition drove said Paige Sedan negligently, carelessly and in violation of the traffic rules and regulations of the State of Arizona and the City of Prescott, and crashed and collided with one certain automobile driven and operated by plaintiffs thereby inflicting upon plaintiffs, and each of them, grevious bodily injuries; that the proximate cause of said accident and injuries to plaintiffs was the negligence and intoxication of said George Ross.

VI.

That plaintiffs thereafter instituted an action in the Superior Court of Yavapai County, Arizona, being Cause No. 10508 therein, against said George Ross to recover damages for and on account of said injuries suffered by plaintiffs as aforesaid in which said action appearance was entered in the name and on behalf of said George Ross by counsel employed by defendant, to wit: Messrs. Sloan, Holton, McKesson and Scott, of Phoenix, Arizona, and said counsel, together with other counsel employed by said George Ross, appeared for and represented said George Ross throughout said suit; that said cause was tried by said Court, with a jury, and on the 9th day of November, 1927, plaintiffs, jointly, recovered a judgment against said George Ross for and on account of said bodily injuries suffered by plaintiffs, and each of them, as aforesaid, in the sum

of Fifteen Thousand Dollars ($15,000.00), together with costs assessed at the sum of $196.35.

VII.

That said judgment is a final, valid, subsisting and unsatisfied judgment, and execution thereof has not been superseded, and that defendant, by reason of the aforesaid [3] special rider or clause, is liable to plaintiffs under said policy for the amount of said judgment.

That plaintiffs have demanded of defendant the payment of said judgment and the same has been denied.

WHEREFORE, plaintiffs pray judgment against defendant for the sum of $15,196.35, and costs of suit.

ANDERSON & GALE,
Attorneys for Plaintiffs.

Filed at 10:30 o'clock A. M., Mar. 19, 1928. Kitty R. Crossman, Clerk. By Emma Shull, Deputy. [4]

[Title of Court and Cause.]

SUMMONS.

Action brought in the Superior Court of Yavapai County, State of Arizona.

The State of Arizona Sends GREETINGS to General Accident, Fire and Life Assurance Corporation, Ltd.

You are hereby summoned and required to appear in an action brought against you by the above-

named plaintiff in the Superior Court of Yavapai County, State of Arizona, and answer the complaint filed with the Clerk of this court at Prescott in said county (a copy of which complaint accompanies this summons), within twenty days (exclusive of the day of service), after the service upon you of this summons, if served in this county; in all other cases thirty days, after the service of this summons upon you (exclusive of the day of service).

And you are hereby notified that if you fail to appear and answer the complaint as above required, plaintiff will take judgment by default against you and judgment for costs and disbursements in this behalf expended.

Given under my hand and seal of said court at Prescott this 19th day of March, A. D. 1928.

[Court Seal] KITTY R. CROSSMAN,
Clerk.
By Emma S. Hull,
Deputy.

ANDERSON and GALE,
Attorneys for Plaintiffs. [5]

State of Arizona,
County of Maricopa,—ss.

I hereby certify that I received the within summons on the 20 day of March, 1928, and personally served the same on the 21 day of March, 1928, on General Accident, Fire and Life Assurance Corporation, Ltd., being the defendant named in said summons, by delivering to Loren Vaughn, as a

member of the Arizona Corporation Commission, County of Maricopa, two copies of summons and two true copies of the complaint in the action named in the said summons, attached to said summons.

Dated this 21 day of March, 1928.

J. D. ADAMS,
Sheriff.
By GEO. A. BRAWNER,
Deputy.

Sheriff's Fee, Service $1.50
Mileage 2 .....$ .30

Total $1.80

Filed March 28, 1928, at 2:20 o'clock P. M. Kitty R. Crossman, Clerk. By Lula McIntosh, Deputy. [6]

In the District Court of the United States for the District of Arizona.

No. 272—LAW—PRESCOTT.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD.,
Defendant.

PLEA IN ABATEMENT AND DEMURRER.

Comes now the defendant, General Accident, Fire and Life Assurance Corporation, Ltd., by its attorneys, Sloan, Holton, McKesson & Scott, and as a plea in abatement to the plaintiffs' complaint shows to the Court as follows:

That if George Ross, mentioned in plaintiffs' complaint, did obtain and file with the Arizona Corporation Commission one certain policy of indemnity insurance, duly written and issued by defendant, as alleged in plaintiffs' complaint, and if in conformity with the orders of the Arizona Corporation Commission duly adopted and promulgated, or otherwise, a special rider or clause was attached to said policy, as alleged in plaintiffs' complaint, providing that said policy should inure to the benefit of any and all persons suffering loss or damage, defendant alleges that all benefits conferred by said rider or clause upon persons suffering loss or damage were conditioned upon the recovery by said persons of a final judgment against the person assured in said policy of indemnity insurance and that the right or benefit on the part of any person or persons so injured was subject to all of the covenants, terms, conditions and agreements contained in said policy of insurance. [24]

Defendant further alleges that if the plaintiffs in the above-entitled cause, after the 2d day of July, 1927, instituted an action in the Superior Court of the State of Arizona in and for the County of Yava-

pai, being cause No. 10,580 in said Superior Court, against one George Ross to recover damages for and on account of personal injuries suffered by plaintiffs, and if said cause was tried on the 9th day of November, 1927, as alleged in plaintiffs' complaint and a judgment recovered against said George Ross for and on account of said personal injuries in the sum of Fifteen Thousand Dollars ($15,000.00), together with costs of One Hundred Ninety-six and 35/100 Dollars ($196.35), as alleged in plaintiffs' complaint, that said judgment is not a final judgment as contemplated by the special rider so attached to said policy of insurance, or as contemplated by the rules and regulations of said Arizona Corporation Commission, or as contemplated by the laws of the State of Arizona in such case made and provided.

Defendant further alleges that if there is a judgment as alleged in plaintiffs' complaint against the said George Ross and in favor of said plaintiffs in this action that an appeal has been perfected and is now pending in the Supreme Court of the State of Arizona from said judgment and that said judgment will not become final as contemplated by law and by the said contract and rider and by the rules and regulations of the Corporation Commission of the State of Arizona until said appeal has been heard and the issues thereof determined by said Supreme Court of the State of Arizona.

WHEREFORE, defendant prays that said action be abated pending a determination by the Supreme Court of the State of Arizona of the is-

sues involved in the appeal of said cause No. 10,580 in the Superior Court of Yavapai County, Arizona.

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for Defendant. [25]

DEMURRER.

Should the foregoing plea in abatement be denied, but without waiving the same, or any part thereof, defendant as a further defense to said complaint demurs thereto as follows:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays the judgment of the Court as to the sufficiency of said complaint; that the same be dismissed and that it recover its costs herein expended.

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for Defendant.

[Endorsed]: Filed May 19, 1928. [26]

[Title of Court and Cause.]

MOTION TO VACATE AND SET ASIDE ORDER FOR JUDGMENT AND FOR LEAVE TO ANSWER.

Comes now General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, defendant above named, by its attorneys, Sloan, Holton, McKesson & Scott, and moves the Court to vacate and

set aside its order for judgment against the defendant in the above-entitled cause, entered on the sixth day of August, 1928, and for leave to answer herein, and for grounds thereof represents:

I.

That said order was entered contrary to Rule 20 of the Rules of Practice of the United States District Court in and for the District of Arizona, which said rule reads as follows:

"RULE 20.

PLEAS.

There can be no plea in actions at law, but in such cases the answer takes the place of all pleas. In suits in equity, pleas may be put in subject to the provisions of these rules and subject to the provisions of the equity rules. All matter in abatement, in cases where pleas are permissible, shall be set up by plea, and if not so set up shall be waived; provided, that objections to the Federal jurisdiction may be taken as provided by Rule 94. [27]

* * * * * * * * *

If a plea be set down for argument and overruled, the party putting in the plea shall have, as of course, and without special leave of the Court, ten days after service of written notice of decision in which to put in his answer."

II.

That said order was entered contrary to Rule 15 of the Rules of Practice of the United States Dis-

trict Court in and for the District of Arizona, which said rule reads as follows:

"RULE 15.

LEAVE TO ANSWER ON OVERRULING A DEMURRER—TERMS.

Where a demurrer to a complaint at law or bill in equity is overruled the party demurring shall, unless otherwise specially ordered, have, as of course, and without any special order therefor, ten days after service by the clerk of written notice of the overruling of such demurrer in which to file his answer to the complaint or bill. Mere knowledge of the decision overruling the demurrer shall not be deemed to be the equivalent of the notice above provided for.

III.

That said order was entered against this defendant by surprise in that the hearing on the motion on which said order was entered was not duly and regularly held, for the reason that counsel for defendant was not notified of said hearing and was given no opportunity to be present at said hearing.

IV.

That defendant had, and still has, a good and valid defense to the whole of said complaint, and tenders herewith its answer to said complaint.

V.

That the plea in abatement and demurrer filed in this cause by defendant were not, nor was either of them, immaterial, insufficient, frivolous or with-

out merit; that said plea in abatement and demurrer were filed in said cause by the defendant in good faith. [28]

VI.

That ten days have not elapsed since the overruling of said demurrer to said complaint and the denial of said plea in abatement and the time for answering has not expired, as provided in said Rules 15 and 20 of the Rules of Practice of the United States District Court in and for the District of Arizona.

VII.

The foregoing motion is based upon the affidavit of T. G. McKesson attached hereto and filed herewith, marked Exhibit "A" and upon the proposed answer of defendant tendered herewith, and upon all the papers, records and files in said cause.

RICHARD E. SLOAN,
C. R. HOLTON,
GREIG SCOTT and
T. G. McKESSON,
Attorneys for Defendant. [29]

EXHIBIT "A."

In the District Court of the United States for the District of Arizona.

No. L.—272—PRESCOTT.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD.,
Defendant.

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE AND SET ASIDE ORDER FOR JUDGMENT AND FOR LEAVE TO ANSWER.

State of Arizona,
County of Maricopa,—ss.

T. G. McKesson, being first duly sworn, deposes and says:

That he is one of the attorneys of record for the defendant in the above-entitled cause, General Accident, Fire and Life Assurance Corporation, Ltd., a corporation, and makes this affidavit for and in behalf of said defendant as he is better informed as to the matters and things therein stated than any of the officers of said defendant corporation.

That said defendant regularly filed its plea in abatement and demurrer in this cause within the time to answer and the same came on regularly for

hearing on the 30th day of July, 1928, and was by the Court continued until the 6th day of August, 1928, for the purpose of hearing proof thereon; that affiant appeared in behalf of the defendant at said hearing on said 6th day of August, 1928, and evidence was introduced in support of defendant's plea in abatement; that the Court upon hearing same granted the defendant's plea in abatement; that thereupon counsel for plaintiffs stated that he had a recent case in point and believed that the plea in abatement should be denied; that thereupon the Court ordered the Clerk to [30] temporarily set aside his order granting defendant's plea in abatement and heard counsel for plaintiffs' argument; that thereafter the defendant's demurrer was overruled and the defendant's plea in abatement taken under advisement; a few minutes thereafter the court adjourned until two o'clock P. M.; that thereafter and at the hour of 1:55 P. M., affiant interviewed the Court in chambers and requested that inasmuch as counsel for defendant reside in Phoenix if the Court should deny defendant's plea in abatement that the defendant be granted twenty days within which to answer to the merits of plaintiff's complaint; that thereupon the Court informed affiant that he had read the recent decision cited by counsel for plaintiffs and had decided that the plea in abatement should be denied and that he had a few minutes previously thereto made an order denying defendant's plea in abatement and an order for judgment in favor of plaintiffs as prayed for in their motion for judgment.

Affiant further states that at the said hearing on the 6th day of August, 1928, that the motion of plaintiff for judgment was not heard, and no intimation was given affiant that said motion would be heard or determined and no opportunity was given affiant as counsel for the defendant herein, to be present at the hearing of said motion.

Affiant further states upon information and belief that the plaintiffs introduced no evidence to prove the allegations of their complaint at or before the time the Court made its order for judgment in favor of plaintiffs.

Affiant further states that defendant's plea in abatement and demurrer were filed in good faith and as affiant believed, were material and not frivolous or without merit.

Affiant further states that defendant has a good and valid defense to the whole of plaintiff's complaint, and that such defense to plaintiff's complaint is in substance as follows, to wit: [31]

That on or about the 5th day of February, 1927, the defendant corporation insured one George Ross, of the City of Prescott, Arizona, with its policy of insurance number 574373 against damages he might sustain by reason of an accident resulting in bodily injuries to or in the death of one person limited to the sum of Five Thousand Dollars ($5,000.00) for injuries to any such person from any one accident resulting in bodily injuries or death; that said policy was in full force and effect at the time of the alleged injuries to Etta Clark, one of the plaintiffs herein; that said

policy, in conformity with the orders of the Arizona Corporation Commission, carried the following indorsement:

"In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ——— it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering

said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workman's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913; Fourth Session. [32]

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. A–574373 issued by the GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

Countersigned at Phoenix, Arizona.

Date February 5th, 1927.

THE STANDARD AGENCY, INC.,

————————————, Agent.

FREDERICK W. RICHARDSON,

United States Manager."

That the loss or claim covered by said policy inuring to the benefit of any person suffering such personal injuries in any one accident is limited by the terms of said policy to the sum of Five Thousand Dollars ($5,000.00) for bodily injuries or death to any one person for any one accident. That the largest amount plaintiffs might recover in

this action, if at all, is the sum of Five Thousand Dollars ($5,000.00), together with the costs of suit which affiant upon information and belief states to be One Hundred Ninety-six and 35/100 Dollars ($196.35).

Further affiant saith not.

T. G. McKESSON,

Subscribed and sworn to before me this 8th day of August, 1928.

[Notarial Seal] EDWIN D. GREEN,
Notary Public.

(My commission expires March 19, 1932.)

[Endorsed]: Filed Aug. 9, 1928. [33]

[Title of Court and Cause.]

DEMURRER AND ANSWER.

Comes now General Accident, Fire and Life Assurance Corporation, Ltd., a corporation, defendant above named, by its attorneys, Sloan, Holton, McKesson & Scott, and demurs to plaintiffs' complaint herein and for ground thereof states:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays the judgment of the Court as to the sufficiency of said complaint;

that the same be dismissed and that it recover its costs herein expended.

RICHARD E. SLOAN,
C. R. HOLTON,
T. G. McKESSON, and
GREIG SCOTT,
Attorneys for Defendant.

Should the foregoing demurrer be overruled, but without waiving the same, defendant further answering said complaint admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I thereof. [34]

II.

Admits the allegations contained in Paragraph II thereof.

III.

Denies each and every, all and singular, the allegations contained in Paragraph III thereof, except as hereinafter specifically admitted.

IV.

Denies all the allegations contained in Paragraph IV thereof and in that regard specifically alleges that in conformity with the orders of the Arizona Corporation Commission, duly adopted and promulgated, defendant was required to and did attach to said policy of indemnity insurance a special rider or clause whereby defendant, in consideration of the premium stated in said policy, agreed that regardless of any of the conditions of said policy, the same should cover passengers, as well as other per-

sons, and should inure to the benefit of all persons suffering loss or damage and that suit might be brought thereon in any court of competent jurisdiction within the State by any person, firm, association or corporation suffering any such loss or damage if final judgment was rendered against the assured by reason of any such loss or claim covered by said policy, and the defendant should pay said judgment up to the limits expressed in the policy, direct to the plaintiffs securing said judgment, or the legal holder thereof, upon receiving twenty days written notice from the person suffering such loss or damage.

Defendant further alleges that the limit of liability expressed in said policy issued to the said George Ross limited the defendant's liability to the sum of Five Thousand Dollars ($5,000.00) for bodily injuries or death to any one person for any one accident. That said policy of insurance together with said indorsement, was duly accepted and approved [35] by said Arizona Corporation Commission as a compliance by the said George Ross and defendant with the rules, regulations and orders of said Commission.

V.

Denies each and every, all and singular, the allegations contained in Paragraph V thereof.

VI.

Admits the allegations contained in Paragraph VI thereof.

VII.

Denies each and every, all and singular, the allegations contained in Paragraph VII thereof.

VIII.

Defendant further denies each and every allegation in said complaint contained not herein expressly admitted.

WHEREFORE defendant prays that plaintiffs take nothing by their said action and that it recover its costs herein incurred.

RICHARD E. SLOAN,
C. R. HOLTON,
T. G. McKESSON and
GREIG SCOTT,
Attorneys for Defendant.

State of Arizona,
County of Maricopa,—ss.

T. G. McKesson, being first duly sworn, deposes and says:

That he is one of the attorneys for General Accident Fire & Life Assurance Corporation, Ltd., a corporation, defendant in the above-entitled action, and makes this verification for and on behalf of said corporation defendant for the reason that it is a nonresident of and absent from the State of Arizona; that he has read the foregoing answer and knows the contents thereof; that the same is true, except as to those matters therein stated upon information and belief and as to those he believes it to be true.

T. G. McKESSON.

Subscribed and sworn to before me this 8th day of August, 1928.

[Notarial Seal] EDWIN D. GREEN,
Notary Public.

(My commission expires March 19, 1932.)

[Endorsed]: Filed Aug. 9, 1928. [36]

[Title of Court and Cause.]

AMENDED DEMURRER AND ANSWER.

Comes now General Accident, Fire and Life Assurance Corporation, Ltd., a corporation, defendant above named, by its attorneys, Sloan, Holton, McKesson & Scott, and for its amended demurrer to plaintiffs' complaint herein states:

I.

That several causes of action are improperly united.

II.

That said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE defendant prays the judgment of the Court as to the sufficiency of said complaint; that the same be dismissed and that it recover its costs herein expended.

SLOAN, HOLTON, McKESSON & SCOTT,
RICHARD E. SLOAN,
C. R. HOLTON,
T. G. McKESSON and
GREIG SCOTT,

and things set forth in plaintiffs' complaint defendant alleges:

I.

That the policy of insurance herein referred to contained, among other things, the following provision:

"GENERAL ACCIDENT,
Fourth and Walnut Sts.,
Philadelphia.

ARIZONA COMMON CARRIER ENDORSEMENT.

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ———, it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, [39] or the legal holder thereof, upon the demand of said plaintiff or holder

thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workman's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits, and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. 574373 issued by the GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

Countersigned at Phoenix, Arizona.

zona; that he has read the foregoing Answer and knows the contents thereof; that the same is true, except as to those matters therein stated upon information and belief and as to those he believes it to be true.

T. G. McKESSON. [41]

Subscribed and sworn to before me this 17th day of August, 1928.

[Notarial Seal] EDWIN D. GREEN,
Notary Public Maricopa County, Arizona.
(My commission expires March 19, 1932.)

[Endorsed]: Filed Aug. 18, 1928. [42]

[Title of Court and Cause.]

MOTION TO STRIKE AMENDED DEMURRER AND ANSWER.

Come now the plaintiffs above named, by their attorneys, Anderson and Gale, and move the Court to strike from the files herein defendant's amended demurrer and answer for the following reasons:

1. That said amended demurrer and answer was filed without leave of Court first obtained.

2. That under the rules of this Court, and the statutes of the State of Arizona relating to amendments of pleadings, defendant is not entitled to amend its demurrer and/or answer at this stage of the proceedings without special leave.

3. That the additional ground of demurrer attempted to be set up in said amended answer is frivolous in this, to wit: That it appears from the

complaint, to wit: Par. VI thereof, and it is admitted in Par. VI of defendant's answer that plaintiffs are suing in this action upon a joint judgment, and that separate recoveries are not asked.

4. That the matter contained in the first separate defense of said amended answer is sham and false in this, to wit: That it appears from the complaint, to wit: Par. VI thereof, and it is admitted in Par. VI of defendant's answer, that defendant appeared and was represented by its counsel, Messrs. Sloan, Holton, McKesson & Scott, in the cause in which the judgment referred [43] to was entered in the Superior Court of Yavapai County, Arizona, to wit: L. A. Clark and Etta Clark, His Wife, *versus* George Ross, and that defendant is, therefore, now barred and estopped from claiming or relying upon lack of notice on the part of plaintiffs of the occurrence of the accident and injuries sued on in said prior action, and for which said judgment was rendered.

5. That the matter contained in the second separate defense of said amended answer is sham and frivolous in this, to wit: That it appears from said complaint that plaintiffs are suing in this action in respect to injuries to more than one person, and that the judgment declared on in said complaint was rendered on account of injuries to more than one person. That it appears from all of the pleadings herein that the matters and things contained in said second separate defense are peculiarly within the knowledge of defendant and that denial thereof on information and belief is without

effect. That if defendant intends to predicate any defense upon lack of coverage of said policy it is its duty, in fairness and good faith toward the Court and plaintiffs, to make positive averments of the material facts.

6. That it appears from defendant's answer, and amended answer, as a whole that defendant is liable to plaintiffs in this action up to the limits of its policy.

This motion is based upon all of the pleadings, records and files of this action, and the memorandum of points and authorities submitted herewith.

ANDERSON & GALE,
Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 20, 1928. [44]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that jury trial of the above-entitled cause be, and it is hereby, waived, and that the issues of fact herein may be tried by the Court without a jury.

ANDERSON & GALE,
Attorneys for Plaintiffs.
SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 20, 1928. [45]

In the District Court of the United States, in and for the District of Arizona.

L.-272—PRESCOTT.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a Corporation,
Defendant.

JUDGMENT.

This cause came on regularly for trial on the 21st day of August, 1928, before the Court, sitting without a jury, trial by jury having heretofore been waived by written stipulation of counsel for the respective parties hereto, duly made and filed herein; plaintiffs being represented by counsel, Messrs. Anderson and Gale, defendant appearing by counsel, Messrs. Sloan, Holton, McKesson and Scott.

Both parties having introduced evidence, both oral and documentary, in support of the allegations of their respective pleadings, and the cause having been fully argued to the Court, by counsel for the respective parties, and by the Court taken under advisement, and now the Court having fully considered the evidence and the law applicable thereto, and being fully advised in the premises, finds that plaintiffs have established all of the material allega-

tions of their complaint, and are entitled to judgment for the full amount of defendant's liability, to wit: Ten Thousand Dollars ($10,000.00),— [46]

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs, L. A. Clark and Etta Clark, his wife do have and recover of and from defendant, General Accident, Fire and Life Assurance Corporation, Ltd., a corporation, the sum of Ten Thousand Dollars ($10,000.00) and costs assessed at the sum of $29.60.

Done in open court this 28th day of August, 1928.

F. C. JACOBS,
Judge.

[Endorsed]: Filed Aug. 29, 1928. [47]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 23d day of April, 1928, the record on removal from the Superior Court of the State of Arizona in and for the County of Yavapai, to the United States District Court for the District of Arizona, in the above-entitled cause was filed with the Clerk of said United States District Court. That among the record so filed, as aforesaid, was the complaint of the plaintiffs originally filed in said Superior Court of Yavapai County, Arizona. That said complaint sought a recovery from the defendant by reason of a judgment alleged to have

been had against one George Ross, in cause No. 10580 in the Superior Court of Yavapai County, Arizona, wherein the plaintiffs herein were plaintiffs in said suit and the said George Ross, defendant, and wherein it is claimed by the plaintiffs that the defendant herein is liable on account of having written a policy of insurance covering the car which occasioned the accident complained of in said complaint, which said complaint is a part of the pleadings and record in this case and on file herein.

That thereafter and on the 19th day of May, 1928, the defendant, by its attorneys, filed with the Clerk of the United States District Court its plea in abatement and demurrer [48] upon the ground and for the reason that if George Ross, mentioned in plaintiffs' complaint, did obtain and file with the Arizona Corporation Commission the certain policy of indemnity insurance duly written and issued by defendant, as alleged in plaintiffs' complaint, and if in conformity with the orders of the Arizona Corporation Commission duly adopted and promulgated, or otherwise, a special rider or clause was attached to said policy, as alleged in plaintiffs' complaint, providing that said policy should inure to the benefit of any and all persons suffering loss or damage, nevertheless all benefits conferred by said rider or clause upon persons suffering loss or damage were conditioned upon the recovery by said persons of a final judgment against the person assured in said policy of indemnity insurance, and the right or benefit on the part of any person

or persons so injured was subject to all the covenants, terms, conditions and agreements contained in said policy of insurance; and upon the further ground that if the plaintiffs in said action did institute an action in the Superior Court of the State of Arizona in and for the County of Yavapai against George Ross to recover damages for and on account of personal injuries suffered by plaintiffs, and that if said cause was tried as alleged in said complaint and judgment recovered against George Ross for the sum of $15,000.00, together with costs in the sum of $196.35, that said judgment is not a final judgment as contemplated by the special rider so attached to said policy of insurance, or as contemplated by the rules and regulations of said Arizona Corporation Commission, or as contemplated by the laws of the State of Arizona in such case made and provided; and, for the further reason that, if there is a judgment as alleged in plaintiffs' complaint against the said George Ross and in favor of said plaintiffs in this action, that an [49] appeal has been perfected and is now pending in the Supreme Court of the State of Arizona from said judgment, and that said judgment will not become final as contemplated by law and by the said contract and rider, and by the rules and regulations of the Corporation Commission of the State of Arizona until said appeal has been heard and the issues thereof determined by said Supreme Court; which said plea in abatement and demurrer is a part of the pleadings and record in the case and on file herein.

That thereafter and on the 26th day of May, 1928, the plaintiffs filed herein a motion to strike said plea in abatement as sham and defendant's demurrer as frivolous and for judgment in favor of plaintiffs for want of any answer.

That thereafter and on the 6th day of August, 1928, the Court did set down the plea in abatement for hearing and defendant did introduce in evidence the alleged policy of insurance, a copy of which is attached hereto marked Exhibit "A" and defendant did introduce in evidence an exemplified copy of the notice of appeal and bond on appeal and a certificate by the Clerk of the Supreme Court of the State of Arizona showing that the case of L. A. Clark and Etta Clark, His Wife, vs. George Ross, No. 10580 in the Superior Court of Yavapai County, Arizona, was then pending on appeal in the Supreme Court of the State of Arizona and had not been disposed of and was not in default; a copy of which said notice of appeal, bond on appeal and certificate by said Clerk is hereto attached marked Exhibit "B," Exhibit "C" and Exhibit "D," respectively.

That thereafter and on said 6th day of August, 1928, the Court did grant said plea in abatement. That thereafter and on said day the Court did set aside said order granting defendant's plea in abatement and denied said plea in abatement and did overrule the demurrer and did order that plaintiffs [50] recover judgment against defendant as prayed for in their said complaint; to

all of which the defendant herein duly excepted, which exceptions were allowed by the Court.

That thereafter and on the 9th day of August, 1928, the defendant herein did move to set aside and vacate said order for judgment and did file a proposed demurrer and answer. That thereafter and on the 13th day of August, 1928, the Court did set aside its said order for judgment and permitted the filing of said demurrer and answer by the defendant, which said demurrer and answer are a part of the pleadings and record in this case and on file herein.

BE IT FURTHER REMEMBERED that thereafter and on the 18th day of August, 1928, the defendant herein did serve an amended demurrer and answer upon the plaintiffs herein and on the 20th day of August, 1928, did ask leave of the Court to file said amended demurrer and answer. That said amended demurrer and answer, in addition to the defenses set up in the original demurrer and answer, did demur to said complaint upon the ground that there were several causes of action improperly united, and did set up in said amended answer, in addition to the defenses set up in the original answer, the following defenses:

"I.

That the policy of insurance herein referred to contained, among other things, the following provision:

'GENERAL ACCIDENT
Fourth and Walnut Sts.,
Philadelphia.

ARIZONA COMMON CARRIER ENDORSEMENT.

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ———, it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other [51] persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED,

however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire & Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workman's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. 574373 issued by the GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

Countersigned at Phoenix, Arizona.

Date—February 5th, 1927.

THE STANDARD AGENCY INC.

M. KINGSBURY, Agent.

FREDERIC W. RICHARDSON,

United States Manager.'

II.

That this defendant has received no written notice from the plaintiffs, or either of them, within twenty days from the date of suffering said loss or damage, if any, as is provided in said indorsement, or at all, claiming any loss or damage under said policy or any policy issued by this defendant.

As a further and separate defense to said action defendant alleges:

I.

That said policy of insurance heretofore referred to contained, among others, the following provision: [52]

'STATEMENT 8: Regardless of the number of the assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00).'

II.

That under said provision the limit of liability of this defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars ($5,000.00). As to whether the plaintiffs herein, or either of them, were injured in an accident occasioned by the automobile covered by said policy of insurance herein referred to, or the extent or amount of injuries, if any, to

said plaintiffs, or either of them, this defendant is without information upon which to base a belief and therefore denies that said plaintiffs or either of them, were injured in any accident covered by said policy herein referred to."

That the Court did deny the application of the defendant for leave to amend said answer upon the ground that proof could properly be offered and received under its original answer of all of the defenses set forth in defendant's proposed amended answer; and upon the ground that said amended answer was not served and filed as prescribed by law, and because the first of the separate defenses contained therein, setting up lack of notice in avoidance of the policy was sham and frivolous in that the complaint alleged and the answer admitted that the defendant, General Accident, Fire & Life Assurance Corporation, Ltd., through its attorneys, Messrs. Sloan, Holton, McKesson & Scott, appeared for and represented George Ross, the defendant in cause No. 10580 in the Superior Court of Yavapai County, Arizona, throughout said suit and said defendant was, therefore, estopped to set up and allege lack of notice; to which ruling of the Court the defendant duly excepted and said exception was allowed by the Court.

BE IT FURTHER REMEMBERED that thereupon the case was called for trial and the plaintiffs and defendant in writing duly [53] waived a jury and plaintiffs proceeded to introduce evidence in support of their said complaint. That counsel for plaintiffs offered in evidence an instrument or

document designated "Abstract of Record" in the Supreme Court of the State of Arizona, in the appeal of Cause No. 10580 from the Superior Court of Yavapai County, Arizona. That said instrument or document was not nor did it purport to be a certified copy or copies of the records of the Supreme Court of the State of Arizona, or of the Superior Court of the County of Yavapai, State of Arizona, or of any other court. That said instrument or document was not nor did it purport to be the original of any judgment, judgment-roll, or any other record of the Superior Court of the County of Yavapai, State of Arizona, or of any other court. That said instrument or document did not contain the original nor any copy of the judgment-roll in cause No. 10580 in the Superior Court of the County of Yavapai, State of Arizona, certified to under the hand and seal of the lawful possessor of such records.

That counsel for plaintiffs stated that said document so offered was offered for the purpose of proving the pleadings, the judgment and verdict and other matters essential to be proven in this case in the case of L. A. Clark and Etta Clark vs. George Ross, Cause No. 10580, Superior Court of Yavapai County, Arizona, and referred to in plaintiffs' complaint. That attached hereto is a true copy of the pleadings, instructions, verdict and judgment in said Cause No. 10580 in said Superior Court, as shown by said purported Abstract of Record, received in evidence herein as Plaintiffs' Exhibit 1.

That counsel for defendant objected to the intro-

duction in evidence of said instrument or document upon the ground that it was not the best evidence and that said offer did not conform to the law with reference to the manner and mode for proving official documents and court records within the State of Arizona. [54] That the Court did thereupon overrule defendant's objection to the admission of said instrument or document in evidence and did admit the same in evidence as Plaintiffs' Exhibit No. 1; for the reason, as stated by the Court, that in view of the allegations in the answer admitting certain allegations contained in Paragraph VI of the complaint herein, said Exhibit No. 1 was admissible, which said paragraphs of the complaint and answer are as follows, to wit: Paragraph VI of the complaint reads as follows:

"VI.

"That plaintiffs thereafter instituted an action in the Superior Court of Yavapai County, Arizona, being Cause No. 10580 therein, against said George Ross to recover damages for and on account of said injuries suffered by plaintiffs as aforesaid in which said action appearance was entered in the name and on behalf of said George Ross by counsel employed by defendant, to wit: Messrs. Sloan, Holton, Mckesson and Scott, of Phoenix, Arizona, and said counsel, together with other counsel employed by said George Ross, appeared for and represented said George Ross throughout said suit; that said cause was tried by said Court, with a jury, and on the 9th day of November,

1927, plaintiffs, jointly, recovered a judgment against said George Ross for and on account of said bodily injuries suffered by plaintiffs, and each of them, as aforesaid, in the sum of Fifteen Thousand Dollars ($15,000.00), together with costs assessed at the sum of $196.35."

Paragraph VI of the answer reads as follows:

"VI.

Admits the allegations contained in Paragraph VI thereof." [56]

to which ruling of the Court the defendant did then and there duly except, which said exception was allowed by the Court.

BE IT FURTHER REMEMBERED that thereupon the plaintiffs did offer in evidence in support of their complaint a policy of insurance written by the General Accident, Fire & Life Assurance Corporation, Ltd., the defendant herein, agreeing to indemnify one George Ross, of the town of Prescott, County of Yavapai, State of Arizona, for the period beginning February 5, 1927, and ending December 31, 1927, on account of damages sustained by persons other than employees, by reason of the ownership, maintenance or use of one certain automobile alleged to be owned by said Ross, known as a Paige 5 Passenger Six Cylinder Sedan, built in the year 1926, Motor No. 417333, Serial No. 409495, to which the defendant duly objected upon the ground that it had not yet been shown that the automobile described in said policy was the automobile referred to in said complaint. That the Court did overrule

(Testimony of Leo T. Stack.)

said objection and said policy was admitted in evidence, to which the defendant duly excepted and said exception was allowed by the Court; a copy of said policy is attached hereto marked Exhibit "A."

That thereafter the plaintiffs herein did offer in evidence a letter from LeRoy Anderson addressed to "Mr. B. F. Hunter, c/o Standard Accident Ins. Co., Phoenix, Arizona," and a reply to said letter, signed "Standard Agency, Inc., By B. F. Hunter, Adjuster," and thereupon the following evidence was given and statements of Court and counsel made:

TESTIMONY OF LEO T. STACK, FOR PLAINTIFFS.

"LEO T. STACK, one of counsel for plaintiffs, being called as a witness on behalf of plaintiffs and first duly sworn, testified as follows: [55]

Direct Examination.

(By Mr. ANDERSON.)

Q. What is your name? A. Leo. T. Stack.

Q. Are you associated with the firm of Anderson & Gale? A. Yes, sir.

Q. Or the law office of Leroy Anderson?

A. Yes, sir.

Q. I will ask you to produce a letter written by Leroy Anderson to Mr. B. F. Hunter of the Standard Accident Insurance Company under date of July 7, 1927. Have you got the original?

Mr. HOLTON.—No, we haven't. I don't know anything about it.

(Testimony of Leo T. Stack.)

Mr. ANDERSON.—Q. I show you carbon copy of a letter, Mr. Stack, which I would ask to have the Clerk mark for identification—I show you a carbon copy of a letter and ask you what that is and where it was taken from?

Mr. HOLTON.—May we see that?

Mr. ANDERSON.—As soon as we identify it. When I offer it in evidence.

A. It is a letter written by the firm of Anderson & Gale.

Mr. HOLTON.—Just a minute. I object to that until we look at it. It is properly identified now and I think we have a right to look at it before there is any testimony.

The COURT.—He has not offered it yet. Don't testify to the contents.

A. It is a carbon copy of a letter written by Anderson & Gale on July 7, 1927, to B. F. Hunter, care of the Standard Accident Insurance Company, Phoenix, Arizona, regarding the Clark-Ross automobile collision.

Mr. ANDERSON.—Q. Is that a clean carbon copy of the original letter?

A. It is. It is taken from the office files of the matter in the same bundle of papers as all of the other correspondence we have relating to the matter and in the same folder in which we keep our copies of the pleadings.

The COURT.—Are you going to offer it?

Mr. ANDERSON.—Yes.

The COURT.—Submit it to counsel.

(Testimony of Leo T. Stack.)

Mr. ANDERSON.—Just as soon as I properly identify it.

(Document handed to Mr. Holton.)

Mr. ANDERSON.—Q. Now, I ask you to look at a letter marked—

The COURT.—Have you finished your question?

Mr. ANDERSON.—As soon as I get his—marked Plaintiffs' Exhibit 4 for identification and ask you what that is?

A. This is the answer of the Standard Agency signed by B. F. Hunter or purporting to have been signed by B. F. Hunter, adjuster, in answer to the letter marked for identification Plaintiffs' Exhibit 3.

Q. Was that received in due course of mail?

A. It was.

Q. Where has it been preserved since that time?

A. In the same folder as that from which Exhibit 3 was taken.

Q. And that is the original letter, is it?

A. It is.

Mr. ANDERSON.—I offer both of these, your Honor.

The COURT.—Offer them one at a time. You have offered three. Any objection?

Mr. SCOTT.—Yes. Just a second.

The COURT.—Any objection to it?

Mr. HOLTON.—Yes, if the Court please. I can't see any materiality or I can't see—

The COURT.—Well, let me see it.

(Document handed to the Court.) [57]

Mr. HOLTON.—There is nothing in this case, if the Court please, to show anyone that had any right to bind the defendant in this action. It seems to be a discussion of a question of compromise.

The COURT.—What is the clause of the policy that this is supposed to comply with?

Mr. ANDERSON.—That twenty days' notice that they set up.

The COURT.—What is it? I know about the notice but what is it?

Mr. ANDERSON.—I will find it here in a minute, if it is in here. I don't think it is on this policy at all, your Honor.

Mr. HOLTON.—If the Court pleases, may I see that? I haven't had a chance to read it.

Mr. ANDERSON.—Here it is. 'Providing, however, that no person suffering loss or damage either to persons or property shall be entitled to avail themselves of the benefit of this'—a rider to the policy—'unless within twenty days from the date of suffering such loss or damage he shall serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation at its office in Phoenix, Arizona,' and we have proven that this was the general representative and this is the agency that wrote this policy and that this is a written notice to them.

The COURT.—Does this come within twenty days?

Mr. ANDERSON.—Yes, sir. I will prove that absolutely.

(Testimony of Leo T. Stack.)

Q. Do you know, Mr. Stack, of your own knowledge, when the Ross accident happened?

Mr. HOLTON.—Now, if the Court pleases—

Mr. ANDERSON.—I will bring it within that, so there will be no question about it.

A. On July 2, 1927.

The COURT.—What is the date of this letter?

Mr. ANDERSON.—July 7 and the reply July 11.

The COURT.—Now, the objection is on the ground that it is immaterial?

Mr. HOLTON.—And further ground that there is nothing in these letters which pretend to bind the General Accident.

The COURT.—Who is this written to, Hunter?

Mr. HOLTON.—Man by the name of B. F. Hunter, care of Standard Accident Assurance Company, Phoenix, Arizona.

The COURT.—Who is B. F. Hunter?

Mr. ANDERSON.—He is the claim agent and the agent of the Standard—whatever it is—insurance company who wrote this policy as shown by the records of the Corporation Commission and they are all—all they say here is upon the representatives of the General Accident, Fire & Life Assurance Corporation at its office in Phoenix, Arizona, and he is that representative.

The COURT.—You had better prove it.

Mr. ANDERSON.—Already proved it by the records of the Arizona Corporation Commission.

The COURT.—The records show that Hunter was the representative?

(Testimony of Leo T. Stack.)

Mr. ANDERSON.—No, shows the Standard Life and that he was the representative of them.

Mr. HOLTON.—The letter is addressed to the Standard Accident Insurance Company, Detroit, Michigan.

Mr. ANDERSON.—That is at Phoenix.

Mr. HOLTON.—And not the Standard Agency at all.

Mr. ANDERSON.—If the Court pleases, these objections are just plain silly and simply—I will go about it further. They know that they got this and, besides, they appeared and defended and that waived that written notice.

The COURT.—You say that.

Mr. ANDERSON.—I do and I will prove it.

Q. Mr. Stack, do you know who was present at the trial of the George Ross case verses L. A. Clark as representing the defendant here in this case? [58]

Mr. SCOTT.—Object to the question as wholly immaterial. These policies bind to defend the action, even though groundless. There is ample authority on that. It is immaterial whether they appeared for the defendant or who appeared for the defendant, so far as these notices are concerned.

The COURT.—Well, the objection is overruled. Answer the question.

A. C. R. Holton.

Mr. ANDERSON.—Q. Do you know who he represented and so stated?

(Testimony of Leo T. Stack.)

A. He appeared for Sloan, Holton, McKesson & Scott during the trial of that action.

Q. Did he appear for the defendant or for the Insurance Company, do you know?

Mr. SCOTT.—Object to the question and that there is no insurance company a party defendant to that action.

Mr. ANDERSON.—I know, but he stated that he was there and represented the Insurance Company.

Mr. SCOTT.—That is not the best evidence. The record itself—

Mr. ANDERSON.—There is no record of it, because—

The COURT.—If this man Hunter represented this agency, you can't—

Mr. ANDERSON.—Q. Do you know who Mr. Hunter represented?

Mr. HOLTON.—Object to that question.

The COURT.—Objection overruled.

A. I am not acquainted with him personally but he signs the letter on behalf of the Standard Agency.

Mr. HOLTON.—Object to that. The letter speaks for itself.

Mr. ANDERSON.—Q. Did he come to our office representing any particular insurance company?

A. I never talked to him personally.

Mr. HOLTON.—He has already stated he is not acquainted with him.

(Testimony of Leo T. Stack.)

Mr. ANDERSON.—Q. Do you know that he came there?

A. I think he came there at one time, yes.

Q. Do you know who he represented?

A. He represented the Ross insurer.

Mr. ANDERSON.—That is all.

Cross-examination.

(By Mr. HOLTON.)

Q. Mr. Stack, you stated at one time that you were not acquainted with this gentleman.

A. I am not personally acquainted with him, no.

Q. You did not see him when he was at the office—he did not interview you?

A. I never talked to him personally, so far as I now recall.

Mr. HOLTON.—That is all.

A. I know, however, that he came to the office.

Mr. SCOTT.—Object to the witness testifying when there is no answer before the Court.

The COURT.—Yes. Well, Exhibit 3 for Identification and 4 for Identification are admitted in evidence.

Mr. SCOTT.—May there be an exception?

Mr. HOLTON.—Exception noted, if the Court pleases.

Mr. ANDERSON.—If the Court please—

Mr. HOLTON.—May there be an exception?

Mr. ANDERSON.—I want to call attention to the way this—where we are getting on this.

Mr. HOLTON.—May there be an exception noted?

The COURT.—Enter an exception to the ruling of the Court admitting 3 and 4.

Mr. ANDERSON.—We allege in paragraph six of our complaint that plaintiffs thereafter instituted an action in the Superior Court [59] of Yavapai County, Arizona, against said George Ross to recover damages for and on account of said injuries suffered by plaintiff as aforesaid in which said action appearance was entered in the name and on behalf of said George Ross by counsel employed by defendant, to wit: Messrs. Sloan, Holton, McKesson and Scott, of Phoenix, Arizona, and said counsel together with other counsel employed by said Ross appeared for and represented said Ross throughout said suit; that said cause was tried, etc. Now they admit that they appeared there at that time.

Mr. HOLTON.—I have so testified, Mr. Anderson. I have so testified.

The COURT.—Is that for the purpose of notice?

Mr. ANDERSON.—Why, certainly, a waiver of notice. They had that right at that time and they did appear.

Mr. SCOTT.—The allegation is that we appeared for Ross, not the General Accident.

Mr. ANDERSON.—No.

The COURT.—Proceed.

Mr. SCOTT.—That is the allegation of paragraph six.

The COURT.—There is no objection, just simply a statement.

(Testimony of C. R. Holton.)

Mr. ANDERSON.—That is our case, your Honor.

The COURT.—Plaintiffs rest. Proceed with your defense."

That the Court overruled said objections and said letters were admitted in evidence, to which the defendant duly excepted, which said exceptions were allowed. That a copy of said letters so introduced in evidence are hereto attached marked Exhibit "E" and Exhibit "F," respectively.

TESTIMONY OF C. R. HOLTON, FOR PLAINTIFFS.

That thereafter the plaintiffs called C. R. HOLTON, counsel for defendant, who testified that he was one of counsel for the defendant, Ross, in the trial of the case of L. A. Clark and Etta Clark, His Wife, vs. George Ross, being cause No. 10580 in the Superior Court of Yavapai County, Arizona, hereinabove referred to, and that the abstract of record on appeal in said case was prepared in the office of Sloan, Holton, McKesson & Scott, by parties other than himself, and that he did not know whether it was correct or not.

TESTIMONY OF LEROY ANDERSON, FOR PLAINTIFFS.

That thereafter LEROY ANDERSON, one of the attorneys for the plaintiffs, testified in behalf of plaintiffs that as such attorney he had received a

(Testimony of Miss Dorothy Palmer.)
copy of said abstract of record on appeal in said case from the office of Sloan, Holton, McKesson & Scott. [60]

TESTIMONY OF MISS DOROTHY PALMER, FOR PLAINTIFFS.

Plaintiffs further introduced the testimony of MISS DOROTHY PALMER, Clerk of the Corporation Commission of the State of Arizona, solely to the effect that the policy of insurance mentioned in the complaint was duly filed in the office of the Corporation Commission and was in full force and effect during the period stated in said policy.

That the foregoing testimony of the witnesses hereinbefore named and the introduction of the exhibits hereinbefore mentioned constituted all the testimony put in by plaintiffs to sustain their complaint; that upon the conclusion of said testimony, plaintiffs then and there rested.

BE IT FURTHER REMEMBERED that upon the conclusion of plaintiff's testimony and evidence as put in by plaintiffs as hereinbefore stated, defendant moved to strike Plaintiffs' Exhibit No. 1, upon the ground that the same was incompetent and irrelevant evidence in that the matters therein contained were not exemplified copies of the record sought to be shown. Thereupon the Court overruled said motion, to which exception was then and there taken by the defendant and allowed by the Court.

BE IT FURTHER REMEMBERED that the defendant thereupon demurred to the evidence of plaintiffs upon the ground and for the reason that the same did not tend to prove or disprove any of the issues in the case, and upon the further ground that it appeared from the evidence that there were two causes of action improperly united, in that the plaintiffs, L. A. Clark and Etta Clark, sought in one action to recover for personal injuries received by them under a policy of insurance which limited the injuries received by any one person to $5,000, and that it did not appear from the evidence what, if any, injury or damage had been sustained by either of the plaintiffs, which said motion was by the Court overruled and an exception then and there duly noted and allowed by the Court. [61]

BE IT FURTHER REMEMBERED that the defendant thereupon moved for judgment in favor of the defendant and against the plaintiffs upon the ground and for the reason that said evidence failed to show what, if any, amount each of the plaintiffs was entitled to recover, and upon the further ground that the injuries complained of were not shown to have been caused by the automobile described in said policy introduced in evidence, in that there was no proof that the car described in the complaint was the car described in said policy of insurance, and upon the further ground that there were two causes of action improperly united, in that the policy of insurance introduced in evidence did not give the right to plaintiffs to recover jointly, but limited each to the amount of his injury, but not to exceed the sum of $5,000.00 and there was no

showing as to what damages were sustained by each of said plaintiffs, and upon the further ground that there was no evidence upon which to base any recovery under said complaint in that under the law of the State of Arizona in an action brought by a wife for personal injuries the husband is a necessary party plaintiff, and that, therefore, as a matter of law, no inference or presumption is to be drawn from the amount of the judgment itself what, if any, injury L. A. Clark may have suffered and the amount of the recovery based thereon; further, that if the plaintiffs in order to hold the insurance company under its policy of insurance, should have seen to it that the exact amount of the damage, and the exact amount of the recovery of each of the plaintiffs is ascertained and determined. Whereupon said motion was by the Court denied and the ruling duly excepted to and said exception allowed.

BE IT FURTHER REMEMBERED that thereupon the defendant introduced evidence in defense of said action and did introduce the original transcript of the court reporter's notes in said [62] cause of L. A. Clark and Etta Clark, His Wife, vs. George Ross, numbered 10580 in the Superior Court of Yavapai County, Arizona, hereinabove referred to.

That, as disclosed by the evidence reported in said transcript so introduced in evidence herein as Defendant's Exhibit "A," the automobile accident which formed the basis of said action No. 10580 in said Superior Court of Yavapai County, Arizona, occurred in the manner following:

That at about the hour of 5:30 P. M. on July 2, 1927, the defendant in said action, George Ross, a duly licensed operator of a taxi service in and about the City of Prescott, Yavapai County, Arizona, left the taxi gate of the Fair Grounds near said city driving a Paige Sedan automobile in which were riding, in addition to Ross, four men, one in the front seat by the side of Ross, and three in the rear seat, bound for Prescott. For some distance after leaving said Fair Grounds they proceeded along a road set apart for the use of taxi and for-hire cars and then entered upon the main highway, on Grove Street. Crossing said last-mentioned highway is a wash or dip, which although originally lined with concrete had been allowed to become in a rough and bumpy condition. From the time the car driven by Ross entered the main highway it travelled in a line of cars returning to Prescott from the rodeo held that day at the Fair Grounds. At a point forty to fifty feet south of the aforesaid wash or dip the Ross car, having left said line of cars and while attempting to pass another car, collided with a Hudson coach automobile driven in the opposite direction by L. A. Clark and in which was riding Etta Clark, plaintiffs in the action. That as a result of said collision Ross and three of his passengers were thrown out of the car and Ross was rendered unconscious and taken to the hospital. There was a sharp conflict in the evidence as to the rate of speed of the respective cars, the [64] testimony as to the Ross car varying from fifteen to fifty miles per hour. The testimony is also in conflict as to whether or

not Ross, the defendant in said action, was under the influence of intoxicants at the time of the wreck. According to some of the witnesses the Clark car at the time of the accident and just prior thereto was moving slowly or had come to a standstill. According to plaintiffs' witnesses the Ross car came down the road at a high rate of speed, zigzagging from side to side of the road, struck the wash or dip in the road, bounced, swerved and struck the Clark car a glancing blow in front. Following the collision the Ross car proceeded some twenty-five feet off the highway on the right-hand side of said road, where it struck a boulder or rock. Both cars involved in the accident remained in an upright position at all times. The Clark car was shoved about eighteen inches to the right but remained in the road. Upon the collision Mrs. Clark, who was riding in the front seat with her husband, was thrown against and through the windshield of their Hudson car, sustaining cuts and lacerations about the face and head and bruises in various parts of her body. That immediately following the accident Mr. Clark was bending over his wife ministering to her. According to the testimony of Mr. Clark, his wife, for a time following the collision, was in an unconscious condition.

According to plaintiffs' testimony their car was damaged as follows: The frame was sprung, the motor cracked, front bumper and fenders smashed, windshield broken and the steering-gear jambed The doors and bumper of the Ross car were damaged but the windshield was unbroken. One fender

was bent and a thumb screw on the windshield was broken off. [65]

That the following is all of the testimony in said cause No. 10580 in said Superior Court in any way relating to the personal injuries, if any, sustained by L. A. Clark, one of the plaintiffs therein:

The following testimony of said L. A. Clark, upon direct examination, in said cause, as set forth at the bottom of page 44 and top of page 45 of said reporter's transcript:

> "throwing my wife to the windshield and me on the steering wheel."

The following further testimony of said L. A. Clark, upon direct examination in said cause, as set forth at the bottom of page 54 and top of page 55 of said reporter's transcript:

> "Q. What happened to you, Mr. Clark—what injuries and how were you injured, if at all?
>
> A. By the throwing against the steering wheel my chest and some ribs were bruised and my back was injured and, of course, being very nervous from then on. In driving I am awfully nervous is about all with me."

The following testimony of C. Parker Preston, a witness on behalf of plaintiffs, as shown by the deposition of said witness Preston read at the trial of said cause in said Superior Court, and appearing on page 266 of said reporter's transcript:

> "Direct Examination.
>
> (By Mr. ANDERSON.)
>
> Q. Did you observe Mr. Clark's condition, the gentleman with the lady at the time you

(Testimony of J. E. Russell.)

went over to investigate their condition, at the time of the accident?

A. Outside of appearing to be exceedingly nervous, he was apparently uninjured."

That said transcript of court reporter's notes was received in evidence herein as Defendant's Exhibit "A." [63]

BE IT FURTHER REMEMBERED that J. E. RUSSELL was sworn as a witness for the defendant and testified as follows:

TESTIMONY OF J. E. RUSSELL, FOR DEFENDANT.

That he was one of the attorneys for George Ross, the defendant in the case of L. A. Clark and Etta Clark, His Wife, vs. George Ross, numbered 10580 in the Superior Court of Yavapai County, Arizona, above referred to, and was present at all times during the trial of said cause; that he heard the address to the jury by LeRoy Anderson, chief counsel for the plaintiffs in said cause; that the said Russell was thereupon asked what was said by said LeRoy Anderson in his argument to said jury at said trial with regard to the injuries sustained by Mr. L. A. Clark, to which counsel for plaintiffs then and there objected as incompetent and immaterial. That the defendant stated that it desired to and would prove by said witness, Russell, that said LeRoy Anderson did state in his argument to the jury in said cause that the plaintiffs were

(Testimony of C. R. Holton.)
claiming nothing for the plaintiff L. A. Clark; that said objection was thereupon sustained and defendant was refused permission to introduce evidence of such fact, to which ruling the defendant excepted and said exception was duly allowed.

BE IT FURTHER REMEMBERED that C. R. HOLTON was duly sworn as a witness on behalf of the defendant and testified as follows:

TESTIMONY OF C. R. HOLTON, FOR DEFENDANT.

That he was one of the attorneys for George Ross, the defendant in the case of L. A. Clark and Etta Clark, His Wife, vs. George Ross, cause No. 10580 in the Superior Court of Yavapai County, Arizona, and was present at all times during said trial; that he heard the address to the jury of LeRoy Anderson, chief counsel for the plaintiffs in said cause. That said witness, Holton, was thereupon asked to testify as to what remarks were made by the said LeRoy Anderson to the jury with reference to the injuries sustained by the plaintiff L. A. Clark, to which objection was made by plaintiffs upon the ground that [66] it was incompetent, irrelevant and immaterial. Thereupon counsel for defendant stated that it would prove by the witness Holton that the said LeRoy Anderson had during his address to the jury in said cause number 10580 in said Superior Court of Yavapai County, Arizona, stated that the plaintiff L. A. Clark was claiming nothing

in said action. Said objection was thereupon by the Court sustained, to which ruling the defendant excepted and the same was duly allowed.

The foregoing constituted all the evidence put in by defendant and there was no rebutting testimony on the part of plaintiffs.

BE IT FURTHER REMEMBERED that at the close of the testimony the defendant renewed the motions made by it at the close of plaintiff's case and upon the grounds and for the reasons therein given, all of which said motions were by the Court denied and exceptions taken by the defendant and duly allowed.

BE IT FURTHER REMEMBERED that thereupon the cause was submitted to the Court, who took the same under advisement. That thereafter and on the 28th day of August, 1928, said Court did render judgment in said cause in favor of plaintiffs and against the defendant in the amount of $10,000.00, and costs, which said judgment is in words and figures as follows, to wit:

"In the District Court of the United States, in and for the District of Arizona.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD., a Corporation,
Defendant.

JUDGMENT. [67]

This cause came on regularly for trial on the 21st day of August, 1928, before the Court, sitting without a jury, trial by jury having heretofore been waived by written stipulation of counsel for the respective parties hereto, duly made and filed herein; plaintiffs being represented by counsel, Messrs. Anderson and Gale, defendant appearing by counsel, Messrs. Sloan, Holton, McKesson and Scott.

Both parties having introduced evidence, both oral and documentary in support of the allegations of their respective pleadings, and the cause having been fully argued to the Court by counsel for the respective parties, and by the Court taken under advisement, and now the Court having fully considered the evidence and the law applicable thereto, and being fully advised in the premises, finds that plaintiffs have established all of the material allegations of their complaint, and are entitled to judgment for the full amount of defendant's liability, to-wit: Ten Thousand Dollars ($10,000.00).

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs, L. A. Clark and Etta Clark, his wife, do have and recover of and from defendant, General Accident, Fire and Life Assurance Corporation, Ltd., a corporation, the sum of Ten Thousand Dollars ($10,000.00) and costs assessed at the sum of $29.60.

Done in open court, this 28th day of August, 1928.

F. C. JACOBS,
Judge."

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

The foregoing bill of exceptions having been presented to me for allowance within the time fixed by order of the Court for such purpose, and the same having been examined by me and found to be correct, the same is now on this 17th day of December, 1928, duly signed, approved and allowed.

F. C. JACOBS,
Judge. [68]

EXHIBIT "A."

PLAINTIFFS' EXHIBIT No. 2.

Filed August 20, 1928.

Automobile Liability only Policy

(Commercial Type Cars)

GENERAL ACCIDENT

Fire and Life

ASSURANCE CORPORATION, LTD.

of Perth, Scotland.

(Hereinafter Called the Corporation)

DOES HEREBY AGREE

(1) To Indemnify the Assured, named and described in Statement 1 of the Declarations forming part hereof, against loss by reason of the liability imposed by law upon the Assured for damages on

account of bodily injuries, including death at any time resulting therefrom, accidentally suffered or alleged to have been suffered while this policy is in force, by any person or persons other than employees engaged in the usual course of trade, business, profession or occupation of the Assured, by reason of the ownership, maintenance or use within the limits of the profession or occupation of the Assured, by reason of the ownership, maintenance or use within the limits of the United States of America or Canada, of any of the automobiles enumerated and described in Statement 5 of said Declarations.

(2) To Defend in the name and on behalf of the Assured any suits, even if groundless, brought against the Assured to recover damages on account of such happenings as are provided for by the terms of the preceding paragraph.

(3) To Pay, irrespective of the limits of liability expressed in Statement 8 of the Schedule of Declarations, all costs taxed against the Assured in any legal proceeding defended by the Corporation, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of said liability and the expense incurred by the Assured for such immediate medical or surgical relief as is imperative at the time of the accident, together with all the expense incurred by the Corporation growing out of the investigation of such an accident, the adjustment of any claim or the defence of any suit resulting therefrom.

THE FOREGOING AGREEMENTS ARE SUBJECT TO THE FOLLOWING CONDITIONS:

CONDITION A. The Corporation's liability under this policy is limited as expressed in Statement 8 of the Declarations, which limits shall apply to each automobile covered hereby.

CONDITION B. This policy does not cover any obligation assumed by or imposed upon the Assured by any Workmen's Compensation agreement, plan or law, or cover any loss caused or suffered [69] by reason of the ownership, maintenance or use of any automobile under any of the following conditions: (1) While being driven or manipulated by any person in violation of law as to age, or if there is no legal age limit, under the age of 16 years; (2) While being driven or manipulated in any race or contest; (3) While being used for any purpose other than as specified in Statement No. 6 of said Declarations; (4) While being used for towing or propelling any trailer or any other vehicle used as a trailer; (5) While rented to others or being used to carry passengers for a consideration.

CONDITION C. The premium includes a charge for each automobile dependent upon its description as expressed in Statement 5 of the Declarations, and upon the uses to which it is to be put as expressed in Statement 6 of the said Declarations.

CONDITION D. The Assured upon the occurrence of every accident, and irrespective of whether any personal injury or property damage is ap-

parent at the time of the accident, shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Corporation's head office at Philadelphia, Pennsylvania, or to its duly authorized agent. If a claim is made on account of such accident, the Assured shall give like notice thereof. If, thereafter, any suit is brought against the Assured to enforce such a claim, the Assured shall immediately forward to the Corporation every summons or other process served on him. The Corporation reserves the right to settle any claim or suit. Whenever requested by the Corporation the Assured shall aid in effecting settlements, securing information and evidence, the attendance of witnesses, and in prosecuting appeals, and shall at all times render to the Corporation all co-operation and assistance within his power.

CONDITION E. Except as herein elsewhere provided for, the Assured shall not voluntarily assume any liability, settle any claim, or incur any expense at his own cost, or interfere in any negotiation for settlement or legal proceeding, without the consent of the Corporation previously given in writing.

CONDITION F. No action shall lie against the Corporation to recover for any loss under this policy unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue. No such action shall lie to recover under any other agreement of the Corporation herein contained.

unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within twelve (12) months after the right of action accrues as herein provided. It is understood and agreed that the Corporation does not prejudice by this condition any defenses against such action that it may be entitled to make.

CONDITION G. If any of the terms or conditions of this policy conflict with the law of any State within which coverage is granted, such conflicting terms and conditions shall be inoperative in such States in so far as they are in conflict with such law. Any specific statutory provision in force in any State within which coverage is granted shall supersede any condition of this policy inconsistent therewith.

CONDITION H. In case of payment of loss or expense under this policy, the Corporation shall be subrogated, to the amount of such payment, to all of the Assured's rights of recovery for such loss or expenses against persons, corporations [70] or estates, and the Assured shall execute any and all papers required, and shall co-operate with the Corporation to secure to the Corporation such rights.

CONDITION I. In the event of an accident resulting in bodily injuries to or in death of more than one person, all sums paid by the Corporation in settlement of claims arising therefrom, whether in suit or not, shall be accounted in diminution of

the Corporation's total liability on account of such accident, as provided for in Statement 8 of the Declarations; provided further, that if any such settlement thereunder shall be set aside through due legal process, the credit thereunder shall be void.

CONDITION J. This policy may be cancelled by either of the named parties at any time by a written notice to the other party stating when thereafter the cancellation shall be effective. Said notice may be served upon the Assured by delivery of same to him personally, or to any member thereof, if a co-partnership, or to any officer or person in charge of the business at the address given herein, should said Assured b*y* a Corporation. Said notice may also be served by depositing it in a postoffice, in a post-paid wrapper addressed to the Assured at the postoffice address given herein. If cancelled by the Assured, the Corporation shall receive or retain an earned premium for the time policy has been in force, calculated at short rates in accordance with the table endorsed hereon. If cancelled by the Corporation, the Corporation shall be entitled to the earned premium *pro rata.* The Corporation's check tendered to the Assured in the manner hereinbefore provided for the service of cancellation notice, shall be a sufficient tender of any unearned premium.

CONDITION K. If the Assured carries a policy of another insurer covering concurrently a claim covered by this policy, he shall not recover from the Corporation a larger proportion of any such

claim than the sum hereby insured bears to the whole amount of valid and collectible insurance applicable thereto.

CONDITION L. The Corporation through its duly authorized representatives shall have the right and opportunity at all reasonable times to inspect any of the automobiles described herein.

CONDITION M. No assignment of interest under this policy shall bind the Corporation unless the written consent of the Corporation is endorsed hereon by the United States Manager, or an Assistant United States Manager.

CONDITION N. No condition or provision of this policy shall be waived or altered except by written endorsement attached hereto and signed by the United States Manager or an Assistant United States Manager; nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver of a change in any part of this contract.

CONDITION O. The personal pronoun herein used to refer to the assured shall apply regardless of number or gender.

CONDITION P. No person shall be deemed an agent of the Corporation unless such person is authorized in writing as such agent by the United States Manager.

CONDITION Q. The Statements 1 to 12 inclusive, in the Declarations hereinafter contained, are warranted by the Assured [71] to be true. This policy is issued in consideration of such war-

ranties and the provisions of the policy respecting its premium and the payment of the premium.

This space is intended for the attachment of such endorsement as may be executed as in the policy provided, and, when so executed and attached, they are to be construed as a part of the policy.

GENERAL ACCIDENT
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER ENDORSEMENT

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ——— it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof,

whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workmen's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of policy No. 574373 issued by the GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

FREDERIC W. RICHARDSON,
United States Manager.

Countersigned at Phoenix, Arizona. [72]

Date—February 5th, 1927.

THE STANDARD AGENCY INC.

M. KINGSBURY, Agent.

SCHEDULE OF DECLARATIONS.

STATEMENT 1: Name of Assured—George Ross.

STATEMENT 2: Address of Assured:

Street ————.

Town—Prescott.

County—Yavapai.

State—Arizona.

STATEMENT 3: The Assured is— Individual

(Individual, Copartnership, Corporation or Estate)

STATEMENT 4: The Policy Period shall be from February 5, 1927 to December 31, 1927, at 12 o'clock noon, standard time at Assured's address, as to each of said dates.

STATEMENT 5: A full description of the Automobiles to which this insurance is applicable is given below:

Descriptive Trade Name	Factory No.	Type or Model	Style of Body	Year Built	No. of Cyls.	Kind of Power
Car. No. 1						
Paige	M–417333		5 Pass Sedan	1926	6 Cyl.	Gas
	S–409495					
Car No. 2						
Car No. 3						
Car No. 4						

STATEMENT 6: The purpose for which the above-described Automobiles are to be used are Business & Pleasure Carrying Passengers for Hire (No jitney or bus service).

STATEMENT 7: Assured's occupation or business is Public Livery Service (No jitney or bus service).

STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for Loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars (10,000.00).

STATEMENT 9: None of the above-described automobiles will be rented to others or used to carry passengers for a consideration—except as herein stated carrying passengers for hire. [73]

STATEMENT 10: My stabling or garage arrangements for the above-described automobiles are in the place named in Statement 2—except as herein stated—No exceptions.

STATEMENT 11: No accident has been caused by any automobile driven by or for me, and no claim has ever been made against me as a result of any such accident, and no company has cancelled or refused to issue automobile insurance to me —except as herein stated— No exceptions.

STATEMENT 12: No similar insurance is carried by the Assured on the above-described automobiles — except as herein stated—No exceptions.

Class	Car No. 1 Premiums	Car No. 1 Limits	Car No. 2 Premiums	Car No. 2 Limits
Liability	90.14	5/10		
Damage to Property	Nil			
Damage to Car	Nil			
Endorsements	Nil			
Total	90.14			
Payable	50.00 Feb. 5, 1927			
	40.14 Aug. 5, 1927			

Class	Car No. 3 Premiums	Limits	Car No. 4 Premiums	Limits
Liability				
Damage to Property				
Damage to Car				
Endorsements				
Total				

IN WITNESS WHEREOF, The GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, by its United States Manager, has executed these presents, but this policy shall not be valid unless countersigned by an authorized representative of the Corporation.

FREDERIC W. RICHARDSON,
United States Manager.

Countersigned at Phoenix, Arizona, this 5th day of February, 1927.

THE STANDARD AGENCY, INC.
Authorized for the Purpose.
M. KINGSBURY, Agent. [74]

SHORT RATE CANCELLATION TABLE.

	Per cent of Annual Prem.
1 day	2
2 days	4
3 "	5
4 "	6
5 "	7
6 "	8
7 "	9
8 "	9

		Per cent of Annual Prem.
9	days	10
10	"	10
11	"	11
12	"	12
13	"	13
14	"	13
15	"	14
16	"	14
17	"	15
18	"	16
19	"	16
20	"	17
25	"	19
30	"	20
35	"	23
40	"	26
45	"	27
50	"	28
55	"	29
60	"	30
65	"	33
70	"	36
75	"	37
80	"	38
85	"	39
90	" or three months	40
105	"	45
120	" or four months	50
135	"	55
150	" or five months	60

		Per cent of Annual Prem.
165	days	65
180	" or six months	70
195	"	73
210	" or seven months	75
225	"	78
240	" or eight months	80
255	"	83
270	" or nine months	85
285	"	88
300	" or ten months	90
315	"	93
330	" or eleven months	95
360	" or twelve months	100

AUTOMOBILE LIABILITY POLICY

(Commercial Type Cars)

Policy No. 574373

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD.

of Perth, Scotland

Established 1885

United States Offices
Fourth and Walnut Streets
Philadelphia

Issued to
GEORGE ROSS
Expires December 31, 1927

IMPORTANT
PLEASE READ YOUR POLICY [75]

EXHIBIT "B."

In the Superior Court of the State of Arizona, in and for the County of Yavapai.

No. 10,580.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GEORGE ROSS,
Defendant.

NOTICE OF APPEAL.

Notice is hereby given that George Ross, defendant in the above-entitled action, appeals to the Superior Court of the State of Arizona from the judgment rendered in the Superior Court of Yavapai County, Arizona, in the above-entitled cause on the 9th day of November, 1927, in favor of the above-named plaintiffs and against the defendant, and from the whole thereof, and from that certain order made and entered in the above-entitled cause in said Superior Court of Yavapai County, on the 17th day of December, 1927, in and by which the above-named Superior Court did overrule and deny the motion for a new trial filed by said defendant in said cause.

SLOAN, HOLTON, McKESSON & SCOTT,
J. E. RUSSELL,
Attorneys for Defendant.

[Endorsements on cover]: (Title of Court and Cause.) Notice of Appeal. Filed 1:20 o'clock, P. M., Jan. 17, 1928. Kitty R. Crossman, Clerk. By ————, Deputy. [76]

REGISTER AND FEE BOOK, SUPREME COURT, ARIZONA.

No. 2752.

GEORGE ROSS,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, His Wife,

Appellees.

SLOAN, HOLTON, McKESSON & SCOTT, J. E. RUSSELL, Attorneys for Appellant.

ANDERSON and GALE, Attorneys for Appellees.

Appeal from Superior Court of Yavapai County, Hon. RICHARD LAMSON, Judge.

1928.

May 5—Filed Record on Appeal, 3 Vols. Reporter's Transcript, Plaintiffs' Exhibits 1 for id. and 2–3–4–5–7–adm. in Evidence; Defendant's A–B–C–D–E for identification.

May 5—By check Sloan, Holton, McK. & S. $25.00

May 31—By check Anderson & Gale $15.00

June 1—4 Copies Abstract of Record

June 29—Stip. ext. time to file Applts Brief July 20 (Inc.)
July 20—4 Copies of Appellant's Brief
July 25—Letter of Appellees admitting service of Applts' Brief. [77]

EXEMPLIFICATION.

State of Arizona,
Supreme Court,—ss.

I, Eugenia Davis, Clerk of the Supreme Court of the State of Arizona, do hereby certify and attest the foregoing to be a full, true and correct copy of the Notice of Appeal filed in this court as a part of the record on appeal, from the Superior Court of the State of Arizona in and for the county of Yavapai, in that certain cause in this court numbered 2752, entitled: George Ross, Appellant, vs. L. A. Clark and Etta Clark, His Wife, Appellees, said cause having been filed in this court on the 5th day of May, 1928.

That the page next immediately following said Notice of Appeal is a full, true and correct copy of the docket entries in said cause, as the same appear in Book 9, Register and Fee Book of this court, at page 285 thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court, at Phoenix, this 3rd day of August, 1928.

[Seal of the Supreme Court]

EUGENIA DAVIS,
Clerk, Supreme Court, State of Arizona.

State of Arizona,
Supreme Court,—ss.

I, Henry D. Ross, Chief Justice of the Supreme Court of the State of Arizona, do hereby certify that Eugenia Davis is Clerk of the Supreme Court of the State of Arizona (which court is a court of record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Eugenia Davis as such officer; that the seal annexed thereto is the seal of said Supreme Court; that said Eugenia Davis as such Clerk is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of Arizona.

IN WITNESS WHEREOF, I have hereunto set my hand in my official character as such Chief Justice, at the City of Phoenix, State of Arizona, this 3rd day of August, 1928.

[Seal of the Supreme Court]

HENRY D. ROSS,

Chief Justice, Supreme Court of the State of Arizona. [78]

State of Arizona,
Supreme Court,—ss.

I, Eugenia Davis, Clerk of the Supreme Court of the State of Arizona, (which court is a court of record, having a seal, which is annexed hereto,) do hereby certify that HENRY D. ROSS, whose name is subscribed to the foregoing certificate of

due attestation was, at the time of signing the same, Chief Justice of the Supreme Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Chief Justice above named to the said certificate of due attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the seal of said Supreme Court, at Phoenix, this 3rd day of August. 1928.

[Seal of the Supreme Court]

EUGENIA DAVIS,
Clerk, Supreme Court, State of Arizona.

[Endorsed]: Filed Aug. 6, 1928. C. R. McFall, Clerk United States District Court for the District of Arizona. By Paul Dickason, Chief Deputy Clerk. [79]

EXHIBIT "C."

In the Superior Court of the State of Arizona, in and for the County of Yavapai.

No. 10,580.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GEORGE ROSS,
Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, GEORGE ROSS, as principal, and

AMERICAN SURETY COMPANY, a corporation authorized to transact a surety business in the State of Arizona, as surety, are held and firmly bound unto L. A. CLARK and ETTA CLARK, his wife, plaintiffs in the above-entitled action, in the sum of FIVE HUNDRED DOLLARS ($500.00), lawful money of the United States, to be paid to the said L. A. Clark and Etta Clark, his wife, their heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, and each of us our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Dated this 24 day of January, 1928.

The CONDITION of this obligation is such THAT, WHEREAS, on the 9th day of November, 1927, a judgment was rendered in the Superior Court of the State of Arizona, in and for the County of Yavapai, in that certain action wherein L. A. Clark and Etta Clark, his wife, were plaintiffs, and George Ross was defendant, in favor of the said plaintiffs and against the said defendant, in and by which judgment it was ordered, adjudged and decreed that the said L. A. Clark and Etta Clark, plaintiffs, do have and recover of and from the said George Ross the sum of Fifteen Thousand [80] Dollars ($15,000.00), together with interest thereon from the date of said judgment until paid at the rate of six per cent per annum, together with said plaintiffs' costs assessed in said action, and jury fees in said action, and

WHEREAS, thereafter and within the time allowed by law the defendant, George Ross, did make a motion for a new trial of said action and did move said Court to grant a new trial thereof, which motion was on the 17th day of December, 1927, by order of said Superior Court denied, and

WHEREAS, said defendant does desire to take an appeal to the Supreme Court of the State of Arizona from said judgment and said order denying defendant's motion for a new trial.

NOW, THEREFORE, if the said George Ross shall prosecute his said appeal with effect and shall pay all costs which have accrued in said Superior Court, or which may accrue in said Supreme Court by reason of said appeal, then this bond shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said GEORGE ROSS has hereunto set his hand and the said American Surety Company has caused this instrument to be duly executed by its officer thereunto duly authorized, the day and year first hereinabove written.

GEORGE ROSS,
Principal.

AMERICAN SURETY COMPANY,
By C. F. AINSWORTH,
Resident Vice-President,
Surety.

[Seal] Attest: W. K. JAMES,
Resident Ass't Secy. [81]

Bond approved this 25th day of January, 1928.

KITTY R. CROSSMAN,
Clerk of Superior Court.

Filed at 10:20 o'clock A. M., Jan. 25, 1928. Kitty R. Crossman, Clerk.

State of Arizona,
County of Yavapai,—ss.

I, Kitty R. Crossman, Clerk of the Superior Court of Yavapai County, State of Arizona, do hereby certify and attest the foregoing to be a full, true and correct copy of the Bond on Appeal, in Cause No. 10,580, L. A. Clark and Etta Clark, His Wife, vs. George Ross, as the same appears on file and of record in my office, and I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Superior Court at Prescott, this 2d day of August, A. D. 1928.

[Seal of Superior Court]

KITTY R. CROSSMAN,
Clerk.
By Lula McIntosh,
Deputy.

Filed Aug. 6, 1928. C. R. McFall, Clerk United States District Court for the District of Arizona. By Paul Dickason, Chief Deputy Clerk. [82]

EXHIBIT "D."

CERTIFICATE OF CLERK OF SUPREME COURT.

State of Arizona,
Supreme Court,—ss.

I, Eugenia Davis, Clerk of the Supreme Court of the State of Arizona, do hereby certify that Cause No. 2752 in said court, entitled "George Ross, Appellant, vs. L. A. Clark and Etta Clark, His Wife, Appellees," is on appeal to said Supreme Court from the Superior Court of the State of Arizona in and for the County of Yavapai from a certain judgment of said Superior Court in Cause No. 10,580 therein entitled "L. A. Clark and Etta Clark, His Wife, Plaintiffs, vs. George Ross, Defendant"; that said appeal was duly docketed in said Supreme Court on the 5th day of May, 1928; that the abstract of record was filed by appellant therein on the 1st day of June, 1928; that on the 29th day of June, 1928, a stipulation by and between counsel for the appellant and appellees therein extending the time for filing appellant's opening brief to and including July 20, 1928, was filed in said cause; that on July 20, 1928, appellant duly filed his opening brief in said cause; that on the 25th day of July, 1928, appellant filed proof of service (in the form of a letter from attorneys for appellees) of opening brief and of reporter's transcript upon attorneys for appellees; that the time within which appellees are required to file

their brief in said Supreme Court has not expired and that said appeal from said judgment of said Superior Court of Yavapai County, Arizona, is now pending in said Supreme Court.

WITNESS my hand and the seal of said Supreme Court this 3rd day of August, 1928.

[Seal of the Supreme Court]

EUGENIA DAVIS,

Clerk, Supreme Court, State of Arizona. [83]

State of Arizona,
Supreme Court,—ss.

I, Henry D. Ross, Chief Justice of the Supreme Court of the State of Arizona, do hereby certify that Eugenia Davis is Clerk of the Supreme Court of the State of Arizona (which court is a court of record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Eugenia Davis as such officer; that the seal annexed thereto is the seal of said Supreme Court; that said Eugenia Davis as such Clerk is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of Arizona.

IN WITNESS WHEREOF, I have hereunto set my hand in my official character as such Chief Justice, at the City of Phoenix, State of Arizona, this 3rd day of August, 1928.

[Seal of the Supreme Court]

HENRY D. ROSS,

Chief Justice, Supreme Court, State of Arizona.

State of Arizona,
Supreme Court,—ss.

I, Eugenia Davis, Clerk of the Supreme Court of the State of Arizona, (which is a court of record having a seal, which is annexed hereto,) do hereby certify that Henry D. Ross, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Chief Justice of the Supreme Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Chief Justice above named to the said certificate of due attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the seal of said Supreme Court, at Phoenix, this 3rd day of August, 1928.

[Seal of the Supreme Court]

EUGENIA DAVIS,
Clerk, Supreme Court, State of Arizona.

[Endorsed]: Filed Aug. 6, 1928. C. R. McFall, Clerk United States District Court for the District of Arizona. By Paul Dickason, Chief Deputy Clerk. [84]

EXHIBIT "E."

PLAINTIFF'S EXHIBIT No. 3.

July 7th, 1927.

Mr. B. F. Hunter,
c/o Standard Accident Ins. Co.,
Phoenix, Arizona.

Dear Mr. Hunter:—

I have further investigated the Clark-Ross automobile collision, and Mrs. Clark is really in a bad way. There were reports current on the street last night that she had died, but this, I find this morning, to be untrue. However, she is running a very high temperature, with frequent hemmorrhages, and it is quite apparent that she is going to have a bad time of it.

They had very high opinions as to what they should recover and want me to file suit for Fifteen Thousand Dollars. I believe there is a better chance to settle now than any other time because the woman is seriously ill. She is really in bad shape from her disease, as well as the accident. I believe if you will make me a firm offer of Twenty Five Hundred Dollars ($2500.00) I can get a settlement out of them, for both. This not to include anything for the automobile,—simply to cover the personal injury to Clark and Mrs. Clark, their doctor and medical attendants. This is the very best that I can possibly hope to do, and if we cannot get together on that basis, as reluctant as I am to bring suit against you, I will have to file suit against Ross for the Fifteen Thousand Dollars, and

I think the chances of getting a substantial verdict against him is very good.

Please let me know at your early convenience.

Very truly yours,

ANDERSON & GALE.

By ————————————.

LA–c.

Plts. Exhibit No. 3. Marked for Identification Only. Case No. Law—272—Pct. [85]

Pltfs. Exhibit No. 3. Admitted and filed Aug. 20, 1928. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. Law—272—Prescott. Clark vs. General Accident. [86]

EXHIBIT "F."

PLAINTIFF'S EXHIBIT No. 4.

Fire
Automobile
Public Liability
Plate Glass
Burglary
Elevator

Workmen's Compensation
Accident and Health
Fidelity and Surety Bonds

THE STANDARD AGENCY, INC.

Formerly Carl H. Anderson Insurance Agency.

General Agents

INSURANCE AND SURETY BONDS,

Phoenix, Arizona.

July 11, 1927.

Adams Hotel Bldg. 16 E. Adams St.

Telephone 23101

Mr. Leroy Anderso*y*,

Prescott, Arizona.

Dear Mr. Anderson:

Re: Clark-Ross Collision.

Thanks for your prompt letter of the 7th inst. with reference to the above matter. We note, with regret, that Mrs. Clark is running a high temperature and has frequent hemorrhages, but wonder whether these conditions are attributable to the accident and whether they did not exist even prior to the accident.

We sincerely trust that the suit referred to by you will be withheld, at least until we have an opportunity to perhaps more fully acquaint ourselves with her present condition and to what extent her present condition is attributable to the accident. We note that you are inclined to be entirely reasonable in the matter, but we do feel from the information at present in hand, that $2500. would be out of proportion to the injury. May we ask your consent to communicating with Dr. Flynn for a full and complete report along the above lines, when we will likely be in position to advise further concerning the $2500. offer.

Yours very truly,
STANDARD AGENCY, INC.
By B. F. HUNTER.
B. F. HUNTER,
Adjuster.

BFH:PW.

Pltfs. Exhibit No. 4. Marked for Identification Only. Case No. Law—272—Pct.

Plfts. Exhibit No. 4. Admitted and filed Aug. 20, 1928. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. Law—272—Pct. Clark vs. General Accident. [87]

PLAINTIFF'S EXHIBIT No. 1.

In the Superior Court of the State of Arizona, in and for the County of Yavapai.

No. 10,580.

L. A. CLARK and ETTA CLARK, His Wife,
Plaintiffs,

vs.

GEORGE ROSS,
Defendant.

COMPLAINT.

Come now the plaintiffs above named and for their cause of action against defendant, allege:

I.

That plaintiffs are residents of Yavapai County, Arizona, and are now, and at all of the times herein mentioned have been husband and wife; that defendant is also a resident of Yavapai County, Arizona.

II.

That plaintiffs, at all of the times herein mentioned have been, and are now the owners of one certain Hudson Coach automobile, and in possession of the same; and defendant is now and at all of such times has been duly licensed and permitted by the Arizona Corporation Commission to carry on and

conduct a taxi service business in the city of Prescott, county of Yavapai, and vicinity, and used and has used in connection therewith one certain Paige Sedan automobile; that at all of the times herein mentioned defendant was acting within the scope of said business, license and permit.

III.

That on or about the 2d day of July, 1927, at about the hour of six o'clock P. M., plaintiffs were driving their said automobile in the city of Prescott, county of Yavapai, State of [88] Arizona, on North Grove Street, in a careful, lawful and prudent manner, and had approached, and were about to descend into one certain concrete apron upon and across said street a short distance north of the Mercy Hospital on said street, when defendant approached in said automobile from the opposite direction traveling at an excessive and unlawful rate of speed, to wit: at about fifty or sixty miles per hour, carelessly, negligently, recklessly, dangerously and with utter disregard for the traffic rules and regulations of the State of Arizona, and the city of Prescott, and the rights and safety of other persons traveling upon said street, swaying from side to side on said street, with control of his said automobile wholly lost; that as defendant was about to descend into said concrete apron plaintiff, observing the negligent, careless and dangerous manner in which defendant was operating his said automobile, as aforesaid, came to a full stop and drew over to the extreme right of said street in order to allow defendant full opportunity to pass; but that defendant

failed to reduce the speed at which he was traveling, and continued to operate his said automobile in such careless, negligent, reckless and dangerous manner, and continued to sway from side to side upon said street, and while plaintiff's said automobile was standing motionless, as aforesaid, upon the extreme right side of said street, defendant drove his said automobile into, upon and against, and crashed and collided with the automobile of plaintiff, thereby throwing and hurling plaintiff, Etta Clark, through the windshield thereof, severely cutting, bruising and injuring her on and about her face, head, arms and body; and thereby throwing and hurling plaintiff, L. A. Clark, upon and against the steering wheel of plaintiffs' said automobile inflicting serious bruises and injuries upon his chest and lungs. That at the time of said accident and collision plaintiff, Etta Clark, was sick and afflicted with tuberculosis, and the severe physical shock attendant [89] upon said collision has caused said disease to become more active and virulent, and has rendered her sick, sore and incapacitated, and deprived her of a large part of the benefit of medical care, treatment and rest, and have caused plaintiffs to expend and incur large sums of money for further necessary care and treatment.

IV.

That by reason of the facts aforesaid plaintiffs have been damaged and injured in the sum of Fifteen Thousand Dollars ($15,000.00).

V.

That at all of the times herein mentioned, plaintiffs were in the exercise of all due and proper care and caution, and were guilty of no contributory fault, and the negligence, carelessness and recklessness of defendant was the sole proximate cause of said accident and injuries.

WHEREFORE, plaintiffs pray judgment against defendants in the sum of Fifteen Thousand Dollars ($15,000.00), and for costs of suit.

ANDERSON and GALE,
Attorneys for Plaintiffs.

Come now the plaintiffs above named, and for a further and second cause of action against defendant, allege:

I.

Plaintiffs repeat and incorporate herein by reference the allegations of Paragraphs I and II of their first cause of action.

II.

That on or about the 2d of July, 1927, at about the hour of six o'clock, P. M., plaintiffs were driving their said automobile in the City of Prescott, County of Yavapai, State of Arizona, on North Grove Street, in a careful, lawful and prudent manner, and had approached, and were about to descend into one certain concrete apron upon and across said street a short distance [90] north of the Mercy Hospital on said street, when defendant approached in his said automobile from the opposite direction traveling at an excessive rate of speed, to

wit: at about fifty or sixty miles per hour, in a grossly careless, negligent, reckless and dangerous manner, and with utter disregard for the traffic rules and regulations of the State of Arizona, and City of Prescott, and the rights and safety of other persons traveling upon said street, swaying from side to side on said street, with control of his said automobile wholly lost; that defendant was then and there under the influence of intoxicating liquor to such extent that he was incapable of properly managing and controlling his said automobile at such excessive rate of speed, or at any rate of speed, or under any circumstances whatever; that as defendant was about to descend into said concrete apron plaintiff, observing the grossly negligent, careless and dangerous manner in which defendant was operating his said automobile, as aforesaid, came to a full stop and drew over to the extreme right of said street in order to allow defendant full opportunity to pass; but that defendant failed to reduce the speed at which he was traveling, and continued to operate his said automobile as aforesaid, and to sway from side to side upon said street, and while plaintiffs' said automobile was standing motionless, as aforesaid, upon the extreme right side of said street, defendant wantonly, culpably and with utter disregard of the consequences to life and limb of plaintiffs, and as a proximate result of his said gross negligence, recklessness and intoxicated condition, drove his said automobile into, upon and against, and crashed and collided with the automobile of plaintiffs, thereby throwing and hurling

plaintiff, Etta Clark, through the windshield thereof, severely cutting, bruising and injuring her on and about her face, head, arms and body, and inflicting divers severe wounds and injuries upon her; and thereby throwing and hurling plaintiff, L. A. Clark, [91] upon and against the steering wheel of plaintiffs' said automobile inflicting serious bruises and injuries upon his chest and lungs;

That at the time of said accident and collision plaintiff, Etta Clark, was sick and afflicted with tuberculosis, and that the severe physical shock attendant upon said collision has caused said disease to become more active and virulent, and has rendered her sick, sore and incapacitated, and has deprived her of a large part of the benefit of medical care, treatment and rest, and has caused plaintiffs to expend and incur large sums of money for further care and treatment rendered necessary by said collision and physical shock.

IV.

That by reason of the facts aforesaid plaintiffs have suffered actual damages in the sum of Fifteen Thousand Dollars ($15,000.00), and punitive damages in the sum of Five Thousand Dollars ($5,000.00).

V.

That at all of the times herein mentioned, plaintiffs were observing all due and proper care and caution, and were guilty of no contributory fault; and that the gross negligence, carelessness, wantonness, drunkenness and deliberate disregard of their rights

and safety by defendant, as aforesaid, was the sole proximate cause of said accident and injuries.

WHEREFORE, plaintiffs pray judgment against defendant in the sum of Fifteen Thousand Dollars ($15,000.00) for the further sum of Five Thousand Dollars ($5,000.00) as punitive damages, and for costs of suit.

ANDERSON and GALE,
Attorneys for Plaintiffs.

Come now the plaintiffs above named, and for a further and third cause of action against defendant, allege:

I.

Plaintiffs repeat and incorporate herein by reference the [92] allegations of Paragraphs I and II of their first and second causes of action.

II.

That on or about the 2d day of July, 1927, at about the hour of six o'clock, P. M., plaintiffs were driving their said automobile in the City of Prescott, County of Yavapai, State of Arizona, on North Grove Street, in a careful, lawful and prudent manner, and had approached, and were about to descend into one certain concrete apron upon and across said street a short distance north of the Mercy Hospital on said street, when defendant approached in his said automobile from the opposite direction traveling at an excessive rate of speed, to wit: at about fifty or sixty miles per hour, in a careless, negligent and reckless manner, and with utter disregard for the traffic rules and regula-

tions of the State of Arizona, and the City of Prescott, and the rights and safety of other persons traveling upon said street, swaying from side to side on said street, with control of his said automobile wholly lost; that as defendant was about to descend into said concrete apron plaintiff, observing the negligent, careless and dangerous manner in which defendant was operating his said automobile, as aforesaid, came to a full stop and drew over to the extreme right of said street in order to allow defendant full opportunity to pass; but that defendant failed to reduce the speed at which he was traveling, and continued to operate his said automobile in such careless, negligent, reckless and dangerous manner, and continued to sway from side to side upon said street, and while plaintiffs' said automobile was standing motionless, as aforesaid, upon the extreme right side of said street, defendant drove his said automobile into, upon and against, and crashed and collided with the automobile of plaintiffs, thereby breasking, damaging and injuring the same, to plaintiffs' damage and injury in the sum of ~~Two Hundred Fifty Dollars ($250.00).~~ One Thousand ($1,000.00) [93]

III.

That at all of the times herein mentioned, plaintiffs were observing due and proper care and caution, and were guilty of no contributory fault, and that the negligence, carelessness and recklessness of defendant as herein alleged was the sole proximate cause of said accident and injuries.

WHEREFORE, plaintiffs pray judgment against
One Thousand ($1,000.00)
defendants in the sum of ~~Two Hundred Fifty Dollars ($250.00),~~ and for costs of suit.

ANDERSON & GALE,
Attorneys for Plaintiffs.

Amended by Court order Nov. 5, 1927.

KITTY R. CROSSMAN,
Clerk.
By Emma Shull,
Deputy.

(Filed July 18, 1927.)

(Title of Court and Cause.)

DEMURRER AND ANSWER.

Comes now the defendant and demurs to the complaint upon the following grounds:

That the purported first cause of action therein does not state facts sufficient to constitute a cause of action against the defendant.

That the purported second cause of action therein does not state facts sufficient to constitute a cause of action against the defendant.

WHEREFORE, defendant prays that the complaint be dismissed and for his costs of suit herein.

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for Defendant.

Should the foregoing demurrers, or either or any of them be overruled, but without waiving the same or any of them, defendant answering said complaint, admits, denies and alleges as follows:

Denies all and singular each and every allegation in said [94] complaint contained.

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for Defendant.

(Filed Aug. 8, 1927.)

(Title of Court and Cause.)

COURT'S INSTRUCTIONS TO THE JURY.

Gentlemen of the Jury, it now becomes my duty to instruct you regarding the law governing this case. The pleadings were read to you at length. I will not repeat them but merely state the substance.

It is alleged in the complaint that the plaintiffs, on or about the second day of July were driving an automobile in a careful, lawful, and prudent manner, north on Grove Street; and that the defendant, coming in the opposite direction in his automobile, travelling at an excessive and unlawful rate of speed, to wit: at the speed of about fifty or sixty miles an hour, carelessly, negligently, recklessly, and with disregard for the rules and regulations and the laws of the State of Arizona, swaying from side to side and out of control of his car, ran into the car of the plaintiffs while the plaintiffs' car was standing still on the extreme right side of the street thereby damaging the plaintiff, Mrs. Clark, severely about her face, arms, head, and body; and also damaging the plaintiff, Mr. Clark, inflicting various bruises and injuries; that at the time of the accident the plaintiff, Etta Clark, was afflicted with tuberculosis, and that this accident deprived

her of a large part of the benefit, care, and attention she had theretofore received, and caused her disease to become more active; and that by reason of these facts the plaintiffs have suffered damages in the sum of fifteen thousand dollars; and at all times mentioned the plaintiffs were in the exercise of due care and caution and were not guilty of any contributory negligence. [95]

In the second cause of action the accident is described in about the same way, and the injuries are described as being the same; but it is further alleged that at the time of the accident that the defendant was intoxicated, and that he wantonly, culpably, and with utter disregard of the consequence to life and limb of plaintiffs, drove into the automobile of the plaintiffs, alleging gross negligence. The amount of actual damage claimed in the second cause of action is the same as that in the first, and in addition punitive damages, which I will later define to you, in the sum of five thousand dollars, are asked.

To this complaint the defendant has filed an answer denying all of the allegations of the complaint.

The burden of proof, Gentlemen, is upon the plaintiff to establish the material allegations of his complaint to your satisfaction by a preponderance of the evidence.

You are instructed that a preponderance of the evidence means the greater weight of the evidence. But this is not to be determined solely by the greater number of witnesses testifying in relation

to any particular fact or state of facts. It means that the testimony *on* the party on whom the burden rests must have greater weight in your estimation —have a more convincing effect, then that opposed to it.

You are made by law, Gentlemen, the sole judges of the facts in this case, and of the credibility of each of the witnesses who have testified in the case, and of the weight you will give to their testimony. In determining the credibility and weight you will give their testimony, you have a right to take into consideration their manner and appearance while giving their testimony, their means of knowledge, any interest or motive which they have, if any, and the probability or improbability of the truth of their statements when taken into consideration with the other evidence in the case. [96]

If you believe that any witness has wilfully sworn falsely to any material fact in this case, you are at liberty to disregard all of the testimony of such witness except in so far as it has been corroborated by other credible testimony or supported by other evidence in the case.

You are instructed that if you believe from the evidence in this case that the defendant violated the statutory road law of the State of Arizona, in any particuluar, as hereinafter set forth in these instructions, that such violation is negligence *per se,* and if such negligence was the proximate cause of the injury, then I charge you that the plaintiffs can recover.

The proximate cause of an event is that which is in a natural and continuous sequence, unbroken by any new cause, produces the event. The sequence must be a natural and probable sequence as distinguished from a possible sequence. Natural and probable mean that that which can be foreseen because it happens so frequently that it may be expected to happen again.

The Court instructs the jury as a matter of law that the gist of this action and the foundation of the same is the alleged negligence of the defendant.

You are further instructed that negligence is the want *or* ordinary care; and ordinary care is that degree of care which ought reasonably to be expected from a person of ordinary prudence in view of the circumstances developed in the evidence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances. Negligence consists of the doing or the failure to do anything which a reasonable man, guided by those ordinary considerations which regulate human affairs, would do or fail to do under such circumstances.

The Court instructs the jury that a person of such age and experience as to be capable of exercising discretion, and of appreciating the risks and dangers of driving an automobile upon [97] such a road as has been described in this evidence, must be responsible for any injury which might be inflicted by his inattention to his surroundings and failure to take due precaution against known or obvious dangers.

And I charge you as a matter of law that the defendant, George Ross, in this case is such a person of such age and experience as to be capable of exercising discretion and of appreciating the risks and dangers of driving an automobile upon such a road as has been described in this evidence, and it was his duty to exercise attention to his surroundings and to take care and caution, and if he fails so to do, then he is responsible for any resulting accident or injury.

I instruct you as a matter of law that the place where this accident happened is a public highway and street, within the contemplation of the laws of the State of Arizona, and that plaintiffs had a right to use the same; and that it was the duty of the defendant to use said highway with due care, regard and consideration for the rights of others.

And I charge you as a matter of law that it was the duty of the defendant in this case, as a driver of a motor vehicle upon the public highway, to proceed with attention, care and caution, and with due regard for the rights of other persons upon said highway, under all the facts and circumstances shown in the evidence, in order to avoid accident *an* injury to others; that it was his duty to know that plaintiffs and others had a right to be upon said highway, and to make lawful use of the same.

I charge you as a matter of law that no person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway; and if you find from the evidence in this

case that the defendant was operating his automobile at a rate of speed greater than was reasonable and proper, or in any [98] manner that was unreasonable and improper, and that such operation was the proximate cause of the injury, then I charge you as a matter of law that he is guilty of negligence, and if such negligence cause the injury complained of, defendant is responsible.

I further charge you that the motor vehicle law of Arizona provides a maximum limit for the speed of automobiles in cities, towns, and upon the public roads, and that it is a violation of the law to operate an automobile at a greater speed than these limits. I have given you these limits in another instruction.

You are instructed that the plaintiffs in this case, as well as all travelers on the public highways, had a right to assume that other travellers would observe the law of the road and obey all regulations and statutes relative to the use of the highway and in general exercise reasonable care to avoid injury to themselves or their fellow travellers.

One traveller is not the insurer of the safety of others. All travellers must exercise reasonable care to protect their own safety as well as to avoid injury to others; and the fact if it is a fact from the evidence in this case, that the defendant was a taxi driver gave him no greater rights or privileges upon the highway then the plaintiffs.

And I charge you as a matter of law that plain-

they had not complied with all the rules and regulations relative to securing a permit for the operation of their car, which was duly licensed in the State of California.

I charge you that if you believe from the evidence that the accident alleged in the complaint and mentioned in the evidence resulted from or was caused by the negligence or want of ordinary care, on the part of the defendant, then you must find in favor of the plaintiffs for such sum as you consider will reasonably compensate them for the damage and injuries sustained, [99] if you further find that said negligence or want of care was the proximate cause of the injury; and in arriving at the amount of your verdict you have a right to take into consideration the mental and physical shock to plaintiff, Etta Clark, physical pain and anguish, as well as the physical injuries sustained; and if you believe from the evidence that plaintiff, Etta Clark, was in ill health at the time of said accident, you have a right to take into consideration in arriving at the amount of your verdict any loss or detriment to her health or physical well-being and the extent to which you believe from the evidence her recovery from sickness or disease has been retarded by the physical and mental shock and injuries and fright suffered or sustained by her as a result of said accident.

I charge you it is the duty of persons driving automobiles upon the public highways of the state to drive carefully and with due regard for the rights and safety of other persons upon said high-

ways; to conform to the traffic laws, rules and regulations in the matter of speed and care in the operation of automobiles upon said highways; that it is the duty of such persons to drive reasonably and carefully, and upon the right-hand side of the road or street.

You are further instructed that if you believe from a preponderance of the evidence in the case that defendant, George Ross, drove his said automobile, as alleged in the complaint, carelessly, negligently and without due regard for the rights and safety of plaintiffs and other persons lawfully travelling upon said highway, at a rate of speed in excess of the lawful rate, as I have herein charged you; or if you find from the evidence that defendant diverted from his proper course on the right-hand side of the road or street upon which he was driving and struck the car of plaintiffs on their own proper side, either of said facts constitutes negligence *per se,* and you must find in [100] favor of the plaintiffs. By the term "negligence *per se*" is meant an act of negligence which is negligence in itself, and does not depend upon the surrounding circumstances of the case nor upon the relative situations of the parties.

I further charge you that if you believe from the evidence that the accident in this case resulted from or was caused by the wilfulness or wanton disregard by defendant of the consequences of his acts, or by gross or extreme negligence, whether you find the defendant was intoxicated at the time or not, you are entitled to take those facts into

consideration in arriving at the amount of your verdict, and to add to such amount as you may find as will reasonably compensate plaintiffs for their damage and injuries an additional amount as punitive or exemplary damages by way of punishment for such acts of wilfulness, wanton disregard, or gross negligence of defendant.

If you find in favor of the plaintiffs and find that the defendant was guilty of ordinary negligence only, then the measure of damages in favor of plaintiffs in such an amount as will constitute a just and reasonable compensation for the loss sustained, taking into consideration the mental pain and anguish and suffering, as I have heretofore charged you; not to exceed the amount prayed for in the complaint, to wit: the amount in the first cause of action.

On the other hand, if you find that the defendant was guilty of gross negligence, as the same has been defined to you, then you have a right to assess an additional amount as punishment for such injuries inflicted by such gross negligence, or the wanton disregard of the rights of others. And if you find from the evidence in this case that the defendant was guilty of negligence to such a degree that manifested a wanton disregard of the lives and safety of others, then you can give such an additional amount in the way of punitive or exemplary damages, in [101] addition to the amount you find under the first cause of action, but not exceeding the sum prayed for as punitive damages in the complaint under the second cause of action.

I charge you, Gentlemen of the Jury, that both of the parties to this case have admitted in open court that the state law relative to the rate of speed per hour shall govern in the City of Prescott; and I charge you that said law provides that the maximum rate of speed in urban streets shall not exceed fifteen miles per hour; and I charge you that it is admitted by the evidence in this case without dispute that where this accident happened was within the city limits of the City of Prescott.

The Court instructs the jury that the charge of negligence made by plaintiffs against defendant by this action must be proved to the satisfaction of the jury by a preponderance of the evidence. The jury has no right to presume negligence; and if the evidence does not preponderate in favor of plaintiffs, then the verdict shall be for the defendant.

The Court instructs the jury that negligence is never to be presumed; and the fact that an accident occurred does not justify the jury inferring from that fact that it was caused by the negligence of the defendant.

I charge you, Gentlemen of the Jury, that it is the duty of every person operating an automobile on the public highways of the state to operate the same with due regard for the rights of others upon said highways, and in a careful and prudent manner, and that this rule of law applies to the plaintiffs in this case as well as the defendant. And I further charge you that if you find from the evidence in this case that the plaintiffs failed to ob-

serve such rule and did at the time of the accident operate said automobile in a careless or reckless manner, and that such carelessness or negligence contributed in causing the accident and that such negligent act on the part of the plaintiffs, [102] or either of them, was the proximate cause, then the plaintiffs cannot recover.

To express the same thought in different language, if the accident would not have occurred but for some negligent act upon the part of the driver of the plaintiffs' automobile, then plaintiffs cannot recover.

You are further instructed that even though you should find that the defendant at the time of the accident complained of was guilty of some act or acts of negligence which caused the accident complained of, nevertheless, if you further find that the plaintiff, L. A. Clark, who was operating plaintiffs' automobile, was himself guilty of negligence, and that such negligence on his part contributed to bring about the accident and that without such negligence the accident would not have happened, then and in that event plaintiffs cannot recover, and your verdict must be for the defendant.

Now, Gentlemen, forms of verdict have been prepared and will be submitted to you for your consideration.

If under the evidence and the instructions of the Court you find that the plaintiffs are entitled to recover for their actual damages under the first cause of action, first and second causes of action, the form of your verdict will be as follows:

"We, the jury, duly empanelled and sworn in the above-entitled action, upon our oaths do find in favor of the plaintiffs and assess their actual damages at the sum of blank dollars," and setting whatever amount you find.

Under the second cause of action, if you find in addition to the actual damages that the plaintiffs are entitled to recover punitive damages, as I have heretofore defined that term to you in the above instructions, the form of your verdict will be as follows: [103]

> "We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find the issues herein in favor of the defendant."

You are instructed, Gentlemen, in this as in all civil cases, the concurrence of nine or more jurors is sufficient to render a verdict therein. In all such cases where the jury unanimously agrees upon the verdict, the verdict should be signed by your foreman. However, if nine or more and less than twelve agree, then your verdict should be signed by all of those who agree upon such verdict.

At the close of the argument you will retire to your jury-room, select a foreman from among your number, and proceed to the consideration of your verdict.

INSTRUCTIONS REQUESTED BY THE DEFENDANT AND GIVEN AS MODIFIED BY THE COURT.

IV.

~~You are instructed that the plaintiffs in this case may not recover if they or either of them were guilty of contributory negligence in the operation of their automobile at the time of the accident.~~ To express the same thought in different language, if the accident would not have occurred but for *the* some negligent act upon the part of the driver of the plaintiffs' automobile, then plaintiffs cannot recover.

Given as modified.

RICHARD LAMSON,
Judge.

V.

You are further instructed that even though you should find that the defendant at the time of the accident complained of was guilty of some act or acts of negligence which caused the accident complained of, nevertheless if you further find that the plaintiff L. A. Clark, who was operating plaintiffs' [104] automobile, was himself guilty of negligence, and that such negligence on his part contributed to bring about the accident, *and that without such negligence such accident would not have happened* then and in that event plaintiff cannot recover and your verdict must be for the defendant.

Given as modified.

RICHARD LAMSON,
Judge.

(Words in italics are those added by the Court.)
(Filed November 9, 1927.)

(Title of Court and Cause.)

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oath, do find: In favor of plaintiffs and assess their actual damages at the sum of $12,000.00.

ROY PRATHER,
Foreman.

(Filed November 9, 1927.)

(Title of Court and Cause.)

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find: in favor of plaintiffs and in addition to their actual damages assess $3,000.00 as punitive damages defendant.

ROY PRATHER,
Foreman.

(Filed November 9, 1927.)

(Title of Court and Cause.)

JUDGMENT.

This cause came on regularly for trial on the 5th day of November, 1927, before the Honorable Richard Lamson, Judge of the above-entitled

court, upon the complaint of the plaintiffs and answer of defendant, plaintiffs appearing in person and by their counsel, Messrs. Anderson and Gale, defendant being present [105] in person and by his counsel, J. E. Russell, Esquire, and Messrs. Sloan, Holton, McKesson & Scott;

Thereupon, a jury of twelve good and lawful men was duly and regularly empaneled and sworn to well and truly try the issues, and both parties announcing ready the Court proceeded to hear and try the cause;

Thereupon, and on the 7th, 8th and 9th days of November, 1927, evidence was introduced by both parties in support of the allegations of their respective pleadings, and subsequently, to wit: on the 9th day of November, 1927, the Court having duly instructed the jury upon the law, and counsel for the respective parties having argued the cause to the jury, the jury retired to consider of their verdict, and subsequently, to wit: on the 9th day of November, 1927, the jury returned into open court their two certain verdicts finding the issues in favor of plaintiffs and fixing their actual damages at the sum of Twelve Thousand Dollars ($12,000.00), and awarding punitive damages in the amount of Three Thousand Dollars ($3,000.00), together with costs of suit, said verdicts being respectively in the following form:

> "We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do

find: in favor of plaintiffs and assess their actual damages at the sum of $12,000.00.

(Signed) ROY PRATHER,
Foreman."

"We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find: in favor of plaintiffs and in addition to their actual damages assess $3,000.00 as punitive damages against the defendant.

(Signed) ROY PRATHER,
Foreman."

And said verdicts having been duly and regularly received and recorded, on motion of counsel for plaintiffs,— [106]

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs, L. A. Clark and Etta Clark, his wife, do have and recover of and from defendant, George Ross, the sum of Fifteen Thousand Dollars ($15,000.00), together with interest thereon from the date hereof until paid at the rate of six per cent per annum, and together also with their costs assessed at the sum of $196.35, and that execution do issue therefor in favor of plaintiffs; and

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that the jury fee herein be and the same is hereby fixed at the sum of $216.00, and that the same be, and it is hereby assessed directly against defendant, George Ross, and that execution therefor do issue in favor of the County of Yavapai, State of Arizona.

Done in open court this 9th day of November, 1927.

(Signed) RICHARD LAMSON,
Judge.

(Filed November 15, 1927.)

[Endorsed]: Bill of Exceptions. Settled and Allowed. Filed Dec. 17, 1928. [107]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named defendant, General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, feeling itself aggrieved by the judgment made and entered in this cause on the 28th day of August, A. D. 1928, does hereby appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in its assignment of errors filed herewith, and prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security required of it to perfect its appeal be made, and desiring to supersede the execution of said judgment petitioner herewith tenders bond in such amount as the Court may re-

quire for such purpose and prays that with the allowance of the appeal a supersedeas be issued.

SLOAN, HOLTON, McKESSON, & SCOTT,
Attorneys for Defendant, General Accident, Fire & Life Assurance Corporation, Ltd. [108]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND.

The above petition granted and the appeal allowed upon giving a bond, conditioned as required by law, in the sum of Eleven Thousand Five Hundred Dollars ($11,500.00).

Dated this 27th day of November, A. D., 1928.

F. C. JACOBS,
Judge United States District Court for the District of Arizona.

[Endorsed]: Filed Nov. 27, 1928. [109]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, defendant in the above-entitled cause, and in connection with its petition for appeal makes the following assignment of errors which it avers occurred upon the trial of said cause or were committed by the Court in the rendition of the judgment, or in the prior proceedings in said cause.

FIRST.

The Court erred in overruling and denying defendant's plea in abatement herein upon the grounds and for the reasons following, to wit:

That the complaint seeks to enforce as against the defendant herein under the indemnity clause of a certain policy of indemnity insurance issued to one George Ross, defendant in an action in the Superior Court of Yavapai County, Arizona, a judgment alleged to have been rendered and entered therein in the amount of $15,000 against said Ross for damages arising out of an automobile accident in which the automobile alleged to have been covered by said insurance policy was involved. That the right of the plaintiffs to claim under said insurance policy arises solely out of a special rider or clause [110] attached to said policy providing that said policy should inure to the benefit of any and all persons suffering loss or damage, which right was under the terms of said clause, conditioned upon the recovery by said person of a final judgment against the person assured in said policy of indemnity insurance, namely George Ross.

If judgment was recovered against Ross as alleged in plaintiffs' complaint, nevertheless the defendant contends that such judgment has not become a final judgment as contemplated by the clause or rider attached to said policy. The defendant set up in its plea in abatement and proved that from the judgment of the Superior Court of Yavapai

County, Arizona, an appeal to the Supreme Court of the State of Arizona had been duly and regularly perfected and was at the time of the trial of said plea in abatement pending in said Supreme Court. Defendant contends that the purport and intent of the special rider or clause attached to the indemnity insurance policy is that in the event the injured person shall have recovered a final judgment in which all of the issues of the case have been finally and conclusively adjudicated, then and in that event only may such injured claim that benefit of the indemnity clause in said insurance policy and avail himself thereof. That the Court should, upon the proof of the pendency of said appeal, have granted the plea in abatement abating and staying this action until a final determination of the issues involved in said appeal pending before said Supreme Court of the State of Arizona, and erred in refusing so to do.

SECOND.

The Court erred in refusing defendant leave to file its amended demurrer and answer, which said amended demurrer and answer did, in addition to the defenses set up [111] in the original demurrer and answer, demurred to the complaint upon the ground that there were several causes of action improperly united, and did set up in said amended answer, in addition to the defenses set up in the original answer, the following defenses:

"I.

That the policy of insurance herein referred to

contained, among other things, the following provision:

'GENERAL ACCIDENT
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER ENDORSEMENT.

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ——, it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall

have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire & Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workman's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session. [112]

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. 574373 issued to the GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

Countersigned at Phoenix, Arizona.

Date February 5th, 1927.

THE STANDARD AGENCY INC.

M. KINGSBURY, Agent.

FREDERIC W. RICHARDSON,

United States Manager.

II.

That this defendant has received no written notice from the plaintiffs, or either of them, within twenty days from the date of suffering said loss or damage, if any, as is provided in said indorsement, or at all, claiming any loss or damage under said policy or any policy issued by this defendant.

As a further and separate defense to said action defendant alleges:

I.

That said policy of insurance heretofore referred to contained, among others, the following provision:

'STATEMENT 8: Regardless of the number of the assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00).'

II.

That under said provision the limit of liability of this defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars ($5,000.00). As to whether the plaintiffs herein, or either of them, were injured in an accident occasioned by the automobile covered by said policy of insurance herein referred to, or the extent or amount of injuries, if any, to said plaintiffs, or either of them, this defendant is without

information upon which to base a belief and therefore denies that said plaintiffs or either of them, were injured in any accident covered by said policy herein referred to."

The defendant charges error upon the following grounds and for the following reasons, to wit: For the reason that said amended demurrer and answer set up grounds of demurrer and matters [113] of defense not contained in said original demurrer and answer. That by refusing to permit the filing of said amended demurrer and answer the defendant was deprived of a substantial right.

THIRD.

The Court erred in receiving in evidence Plaintiffs' Exhibit No. 1, said exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of the State of Arizona in the appeal of cause No. 10580 from the Superior Court of the County of Yavapai, State of Arizona, over the objection of defendant that the same was incompetent, irrelevant and immaterial and did not contain the original nor any copy of the pleadings or judgment in said cause No. 10580, certified to under the hand and seal of the lawful possessor of such records as required by the statutes of the State of Arizona as a prerequisite to their admission as evidence of the contents thereof, and that said Exhibit 1 was not the best evidence or any competent evidence of the matters and things attempted to be shown thereby and did not conform to the law with reference to the manner and mode of proving official documents and court records within the State

of Arizona. Defendant assigns the foregoing as error for the following reasons and upon the following grounds, to wit: That the proof of the judgment and pleadings in said cause No. 10580 was essential to a recovery in the case at bar and that said instrument so admitted in evidence did not constitute any proof thereof.

FOURTH.

The Court erred in receiving in evidence over the objection of the defendant, a policy of insurance written by the General Accident, Fire & Life Assurance Corporation, designated as Plaintiffs' Exhibit No. 2, which said policy of insurance did by its terms agree to indemnify one George Ross, of the Town of Prescott, County of Yavapai, State of [114] Arizona, for the period beginning February 5, 1927, and ending December 31, 1927, on account of damages sustained by persons other than employees by reason of the ownership, maintenance or use of one certain automobile alleged to be owned by said Ross, known as a Paige 5 Passenger, 6 Cylinder Sedan, built in the year 1926, Motor No. 417333, Serial No. 409495, for the reason that no proper foundation had been laid for the reception of said document in evidence in that it had not been shown that the automobile described in said policy was the automobile referred to in plaintiffs' complaint.

FIFTH.

The Court erred in receiving in evidence upon the trial an instrument designated Plaintiffs' Exhibit No. 3 over the objection of the defendant, which

said instrument was in words and figures as follows, to wit:

"July 7th, 1927.

Mr. B. F. Hunter,
c/o Standard Accident Ins. Co.,
Phoenix, Arizona.

Dear Mr. Hunter:—

I have further investigated the Clark-Ross automobile collision, and Mrs. Clark is really in a bad way. There were reports current on the street last night that she had died, but this, I find this morning, to be untrue. However, she is running a very high temperature, with frequent hemorrhages, and it is quite apparent that she is going to have a bad time of it.

They had very high opinions as to what they should recover and want me to file suit for Fifteen Thousand Dollars. I believe there is a better chance to settle now than any other time because the woman is seriously ill. She is really in bad shape from her disease, as well as the accident. I believe if you will make me a firm offer of Twenty Five Hundred Dollars ($2500.00) I can get a settlement out of them, for both. This not to include anything for the automobile,—simply to cover the personal injury to Clark and Mrs. Clark, their doctor and medical attendants. This is the very best that I can possibly hope to do, and if we cannot get together on that basis, as reluctant as I am to bring suit against you, I will have to file suit against Ross for the Fifteen Thousand Dollars, and

I think the chances of getting substantial verdict against him is very good.

Please let me know at your early convenience. [115]

Very truly yours,
ANDERSON & GALE.
By ——————————.

LA–c.

Plts. Exhibit No. 3. Marked for Identification Only. Case No. Law—272—Pct.

Pltfs. Exhibit No. 3. Admitted and filed Aug. 20, 1928. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. Law—272—Prescott. Clark vs. General Accident."

Error is assigned upon the admission of the foregoing instrument in evidence upon the ground and for the reasons following, to wit: That said letter did not show or purport to show that B. F. Hunter was an accredited agent, or any agent of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon herein and that said letter did not constitute notice to defendant company as provided by the terms of said policy and was, therefore, incompetent, irrelevant and immaterial.

SIXTH.

That the Court erred in receiving in evidence upon the trial hereof, as Plaintiffs' Exhibit No. 4, over the objection of the defendant, the following letter:

Fire
Automobile
Public Liability
Plate Glass
Burglary
Elevator

Workmen's Compensation
Accident and Health
Fidelity and Surety Bonds

"THE STANDARD AGENCY INC.

Formerly Carl H. Anderson Insurance Agency.
General Agents

INSURANCE AND SURETY BONDS.

Phoenix, Arizona. [116]

July 11, 1927.

Adams Hotel Bldg. 16 E. Adams St.
Telephone 23101.

Mr. Leroy Anderson
Prescott, Arizona.

Dear Mr. Anderson:

Re: Clark-Ross Collision.

Thanks for your prompt letter of the 7th inst. with reference to the above matter. We note, with regret, that Mrs. Clark is running a high temperature and has frequent hemorrhages, but wonder whether these conditions are attributable to the accident and whether they did not exist even prior to the accident.

We sincerely trust that the suit referred to by you will be withheld, at least until we have had an opportunity to perhaps more fully acquaint ourselves with her present condition and to what extent her present condition is attributable to the accident. We note that you are inclined to be entirely rea-

sonable in the matter, but we do feel from the information at present in hand, that $2500. would be out of proportion to the injury. May we ask your consent to communicating with Dr. Flynn for a full and complete report along the above lines, when we will likely be in a position to advise further concerning the $2500. offer.

Yours very truly,
STANDARD AGENCY, INC.
By B. F. HUNTER.
By B. F. HUNTER,
Adjuster.

BFH:PW.

Pltfs. Exhibit No. 4. Marked for Identification Only. Case No. Law—272—Pct.

Pltfs. Exhibit No. 4. Admitted and filed Aug. 20, 1928. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. Law—272—Pct. Clark vs. General Accident."

Error is charged upon the reception of said letter in evidence upon the following grounds and for the following reasons, to wit: That said letter did not show or purport to [117] show that the said B. F. Hunter was an accredited agent or representative, or any agent or representative of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon, and that no evidence whatever had been introduced by plaintiff that said B. F. Hunter was in truth and in fact an agent of the defendant corporation authorized to represent or bind said de-

fendant corporation in any manner whatsoever, and that said letter was wholly irrelevant and immaterial and was not competent evidence of any fact material to the issues of this case.

SEVENTH.

The Court erred in denying defendant's motion made at the close of plaintiffs' case to strike Plaintiffs' Exhibit No. 1, said exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of the State of Arizona in the appeal of cause No. 10580 from the Superior Court, County of Yavapai, State of Arizona. Error is charged upon the following grounds and for the following reasons, to wit: That the offer of said exhibit was for the avowed purpose of proving the judgment and pleadings in cause No. 10580 in the Superior Court of the County of Yavapai, State of Arizona. That said exhibit was not nor did it purport to be a true copy of said pleadings and judgment, certified to by the officer having the custody and charge thereof. That said exhibit did not constitute competent evidence tending to prove or disprove any issue in this case.

EIGHTH.

The Court erred in overruling defendant's demurrer to the evidence at the close of plaintiffs' case, that is to say, defendant's demurrer that the evidence and all of it introduced by plaintiffs in support of their complaint failed to [118] prove facts sufficient to entitle the plaintiffs to a judgment under their complaint. The defendant charges that such ruling was erroneous for the fol-

lowing reasons and upon the following grounds, to wit: That the evidence at the close of plaintiffs' case wholly failed to show that the automobile concerned in the accident complained of in said cause No. 10580 was the identical automobile designated and described in the policy of insurance sued upon in this action. That the evidence at the close of plaintiffs' case wholly failed to show the performance of the condition named in the rider or endorsement upon the insurance policy sued upon, that is to say, that the person suffering loss or damage in order to avail himself of the benefits of said policy and endorsements thereon, should within twenty days from the date of suffering said loss or damage serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Ltd., at its office at Phoenix, Arizona. That there was wholly lacking in the evidence any proof of the performance of the condition above set forth.

NINTH.

The Court erred in overruling defendant's demurrer made at the close of plaintiffs' case that it appeared from the evidence that there were two causes of action improperly united in the complaint. Error therein is charged upon the following grounds and for the following reasons, to wit: That the policy of insurance sued upon herein in express language provided as follows:

"STATEMENT 8: Regardless of the number of the assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries

to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00). [119]

That it appeared from the evidence that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. That under the foregoing facts there were two causes of action improperly united in a single cause of action.

TENTH.

The Court erred in denying defendant's motion made at the close of plaintiffs' case for judgment in favor of the defendant and against the plaintiffs. Error is predicated therein upon the following grounds and for the following reasons, to wit: The evidence at that state of the case failed to show what, if any, amount each of the plaintiffs was entitled to recover. The injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action. That two causes of action were improperly united in that the policy of insurance introduced in evidence did not give the right to plaintiffs to recover jointly but limited each to the amount of his or her injury, but not to exceed Five Thousand Dollars ($5,000.00) each, and there was no showing as to what damages were sustained by each of said plaintiffs. That the plaintiffs wholly failed

to establish by the evidence the facts necessary to entitle them to recover under the terms of the policy upon which they were suing.

ELEVENTH.

That the Court erred in sustaining the objection of counsel for plaintiffs to the following question asked of defendant's witness J. E. Russell, concerning certain statements alleged to have been made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in cause No. 10580 in the Superior Court of Yavapai County, Arizona: [120]

(By Mr. HOLTON.)

Q. I will ask you whether you recall Mr. Anderson, attorney for the plaintiffs, making any statement in his argument to the jury with respect to the amount of damages for Mr. Clark? To the best of your recollection will you testify and tell the Court what that statement was?

Error is predicated upon the following grounds and for the following reasons, to wit: That counsel for the defendant did following such question avow that he intended to prove by the witness Russell that Mr. Anderson, attorney for the plaintiffs in cause No. 10580 in the Superior Court of Yavapai County, Arizona, in his argument to the jury, said in substance, that he was claiming no damages on behalf of Mr. Clark in that action. That defendant, as throwing light upon the right of the Court to allow damages for personal injuries to L. A. Clark under the policy of insurance sued upon herein, had a right to show that no claim was made in said cause No. 10580 for such damages and that

if the plaintiff L. A. Clark was injured in any manner whatsoever the plaintiffs by their counsel waived any such damages and that, as a matter of fact, no damages were awarded in said cause No. 10580 on account of personal injuries received by L. A. Clark.

TWELFTH.

The Court erred in sustaining the objection of counsel for plaintiffs to the following question asked of the defendant's witness C. R. Holton; concerning what statements were made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in said cause No. 10580 in the Superior Court of Yavapai County, Arizona:

(By Mr. SCOTT.)

Q. What did he (Anderson) say with respect to the amount of damages claimed by Mr. Clark?

Error is predicated upon the following grounds and for the following reasons: That counsel for the defendant did avow at the time of the propounding of said question, that he [121] intended to prove by said witness that Mr. Anderson, counsel for the plaintiffs in cause No. 10580, in his argument to the jury said in substance that he was not asking for any damages for any injuries sustained by L. A. Clark in the accident concerned in said cause. That defendant had a right to show that if L. A. Clark sustained any injuries whatsoever in the accident complained of in said cause No. 10580, that he was not asking for any damages

therefor and that by the statement of his counsel made in the argument of said cause, he waived any such damages.

THIRTEENTH.

The Court erred in overruling defendant's demurrer to the evidence at the close of the case upon the ground that said evidence wholly failed to entitle plaintiffs to recover in this action. Error is predicated upon said ruling upon the grounds and for the reasons following: That the evidence in the case wholly failed to show that the automobile concerned in the accident complained of in cause No. 10580 was the identical automobile designated and described in the policy of insurance sued upon in this action. That said evidence wholly failed to show the performance of the condition named in the rider or endorsement upon the insurance policy sued upon, that is to say, that the person suffering loss or damage, in order to avail himself of the benefits of said policy and endorsements thereon, should within twenty days from the date of suffering said loss or damage, serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Ltd., at its office at Phoenix, Arizona. That there was wholly lacking in the evidence any proof of the performance of the condition above set forth. That the evidence wholly failed to show what, if any, personal injury was received by plaintiffs or either of them. [122]

FOURTEENTH.

The Court erred in overruling defendant's de-

murrer at the close of the case that it appeared from the evidence that there were two causes of action improperly united in the complaint. Error therein is charged upon the following grounds and for the following reasons, to wit: That the policy of insurance sued upon herein in express language provided as follows:

"STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00)."

That it appeared from the evidence that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. That under the foregoing facts there were two causes of action improperly united in a single cause of action.

FIFTEENTH.

The Court erred in denying defendant's motion made at the close of the entire case for judgment in favor of the defendant and against the plaintiffs. Error is predicated upon the following grounds and for the following reasons, to wit: The evidence at that stage of the case failed to show what, if any, amount each of the plaintiffs was entitled to re-

cover. The injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action. That two causes of action were improperly united in that the policy of insurance introduced in evidence did not give the right to plaintiffs to recover jointly but limited each to the amount of his or her injury, but not to exceed Five Thousand Dollars ($5,000.00), each, and there was [123] no showing as to what damages were sustained by each of said plaintiffs. That the plaintiffs wholly failed to establish by the evidence the facts necessary to entitle them to recover under the terms of the policy upon which they were suing.

WHEREFORE, the said General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, prays that the judgment of the District Court may be recovered.

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for General Accident, Fire & Life Assurance Corporation, Ltd., Defendant.

[Endorsed]: Filed Nov. 27, 1928. [124]

BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, as principal, and American Surety Company, a corporation authorized to transact a surety business in the State of

Arizona, as surety, are held and firmly bound unto L. A. Clark and Etta Clark, his wife, in the full and just sum of Eleven Thousand Five Hundred Dollars ($11,500.00), to be paid to the said L. A. Clark and Etta Clark, his wife, their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

DATED this 26th day of November, in the year of our Lord one thousand nine hundred and twenty-eight.

WHEREAS, lately at a District Court of the United States for the District of Arizona, at Prescott in said District, in a suit depending in said Court, between L. A. Clark and Etta Clark, his wife, and General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, a judgment was rendered against the said General Accident, Fire & Life Assurance Corporation, Ltd., and the said General Accident, Fire & Life Assurance Corporation, Ltd., having obtained from said Court an order allowing appeal to reverse the judgment in the aforesaid suit, and a citation directed to the said L. A. Clark and Etta Clark, his wife, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said General Accident, Fire & Life Assurance Corporation, Ltd., a corporation,

shall prosecute its said appeal to effect, and answer all damages and costs if it fail to [125] make its plea good, then the above obligation to be void; else to remain in full force and virtue.

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD.

By SLOAN, HOLTON, McKESSON & SCOTT,
Its Attorneys.

AMERICAN SURETY COMPANY,
By C. F. AINSWORTH,
Resident Vice-President.

[Corporate Seal] Attest: W. K. JAMES,
Resident Assistant Secretary.

Form of bond and sufficiency of surety approved this 27th day of November, A. D. 1928.

F. C. JACOBS,
United States District Judge.

[Endorsed]: Filed Nov. 27, 1928. [126]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to L. A. Clark and Etta Clark, His Wife, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States

District Court for the District of Arizona, wherein General Accident Fire & Life Assurance Corporation, Ltd., a Corporation, is appellant, and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable F. C. JACOBS, United States District Judge for the District of Arizona, this 27th day of November, A. D. 1928.

F. C. JACOBS,
United States District Judge. [127]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Arizona,—ss.

I hereby certify and return that I served the annexed citation on appeal on the therein named L. A. Clark and Etta Clark, his wife, by handing to and leaving a true and correct copy thereof with LeRoy Anderson, Attorney, and Leo T. Stack, Attorney, personally, at Prescott, Ariz., in said District on the thirteenth day of November, A. D. 1928.

G. A. MAUK,
U. S. Marshal.
By Robert V. Born,
Deputy.

[Endorsed]: Filed Dec. 1, 1928. [128]

LETTER OF SLOAN, HOLTON, McKESSON & SCOTT TO LeROY ANDERSON.

Law Offices

Richard E. Sloan
Charles R. Holton
Theodore G. McKesson
Greig Scott

Edwin D. Green

SLOAN, HOLTON, McKESSON AND SCOTT
Fleming Building
Phoenix, Arizona

November 14, 1928.

Mr. LeRoy Anderson,
Attorney at Law,
Prescott, Arizona.

Dear Sir:

At the hearing upon your objections to the Bill of Exceptions in the case of L. A. Clark and Etta Clark, his wife, vs. General Accident, Fire & Life Assurance Corporation, Ltd., being cause No. L–272 —Prescott, in the District Court of the United States for the District of Arizona, you stated that there were numerous places in the reporter's transcript of the evidence (Defendant's Exhibit 1), where evidence appeared touching upon the personal injuries suffered by L. A. Clark. In that regard the Court denied your objections numbered 11 and 14 provided that our bill of exceptions should contain all of the evidence, as shown by said transcript, relative to such personal injuries to L. A. Clark.

We have again carefully examined the reporter's transcript of the evidence and do not find any reference therein to the injuries to L. A. Clark other than those stated in our original bill of exceptions. Nevertheless, if you will designate the page and line of any such evidence in the transcript of the reporter's notes, or in the record anywhere, we will be glad to incorporate such evidence in the Bill of Exceptions.

As we were allowed ten days from last Saturday within which to file our bill of exceptions with the Court's corrections therein we would thank you to call our attention immediately to such evidence as you have in mind in order that we may incorporate it into the revised bill of exceptions.

Very truly yours,

SLOAN, HOLTON, McKESSON & SCOTT,

By C. R. HOLTON.

CRH/g.

[Endorsed]: Filed Nov. 14, 1928. [129]

Honorable F. C. JACOBS, United States District Judge, Presiding.

March, 1928, Term, at Prescott.

(Minute Entry of July 23, 1928).

[Title of Court and Cause—L.-272—Prescott.]

ORDER CONTINUING DEFENDANT'S PLEA IN ABATEMENT.

Le Roy Anderson, Esq., and Leo T. Stack, Esq., appear as counsel for the plaintiff. No counsel present for the defendant. Whereupon,

IT IS ORDERED BY THE COURT that pending matters herein are continued one week, counsel on both sides to submit briefs.

Minute Entry of July 30, 1928.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L-272—Prescott.)

ORDER DENYING MOTION FOR JUDGMENT.

Leo T. Stack, Esq., appears as counsel for the Plaintiffs. C. R. Holton, Esq., appears as counsel for the defendant.

The plaintiffs' motion for judgment on the pleadings is by the Court ordered denied, and exceptions entered for the plaintiffs.

The defendant's plea in abatement and demurrer

are by the Court ordered continued to the next call of the law and motion calendar. [130]

Minute Entry of August 6, 1928.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.-272—Prescott.)

ORDER OVERRULING PLEA IN ABATEMENT, ETC.

Le Roy Anderson, Esq., and Leo. T. Stack, Esq., appear as counsel for the plaintiffs. T. G. McKesson, Esq., appears as counsel for the defendant.

The defendant's plea in abatement is argued to the Court by respective counsel, and is by the Court ordered to stand submitted and is taken under advisement.

The defendant's demurrer is presented to the Court, and is by the Court ordered overruled.

Subsequently, the Court being advised in the premises,—

IT IS ORDERED that defendant's plea in abatement is overruled and denied, and plaintiffs' motion for judgment on the pleadings herein is granted. Exceptions to said rulings of the Court are ordered saved to the defendant.

Minute Entry of August 13, 1928.

(Court and Cause—L.-272—Prescott.)

ORDER VACATING ORDER FOR JUDGMENT ON PLEADINGS.

Leo T. Stack, Esq., appears as counsel for the plaintiffs. T. G. McKesson, Esq., appears as counsel for the defendant.

The defendant's motion to vacate order for judgment on the pleadings and for leave to answer come on regularly for hearing this date. Thereupon, IT IS ORDERED by the Court that defendant's motion for order vacating order for judgment on the pleadings herein is granted, and said order for judgment on the pleadings is vacated and set aside, and

IT IS FURTHER ORDERED that defendant is allowed to file answer herein and this case is set for trial on Monday, August 20th, 1928, at the hour of ten o'clock A. M. [131]

Minute Entry of August 20, 1928.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.-272—Prescott.)

TRIAL.

LeRoy Anderson, Esq., and Leo T. Stack, Esq., appear as counsel for the plaintiffs. Sloan, Holton, McKesson and Scott, appear as counsel for the

defendant, this case coming on regularly for trial this date.

Written stipulation, signed by counsel for both sides waiving trial by jury, is now duly filed.

D. A. Little, Shorthand Reporter, is duly sworn to report the evidence in this case.

IT IS ORDERED that the defendant's application to file amended answer is denied, to which ruling of the Court, the defendant excepts.

PLAINTIFFS' CASE.

C. R. Holton is sworn and examined on behalf of the plaintiffs.

Exhibit No. 1, Abstract of Record, is admitted in evidence and filed on behalf of the plaintiffs.

Doroth Palmer is sworn and examined on behalf of the plaintiffs.

Exhibit No. 2, Policy of Insurance, No. 574373, is admitted in evidence and filed on behalf of the plaintiffs.

Leo T. Stack is called, sworn and examined on behalf of the plaintiffs.

Exhibit No. 3, carbon copy of letter dated July 7, 1927, is admitted in evidence and filed on behalf of the plaintiffs.

Exhibit No. 4, letter dated July 11, 1927, is admitted in evidence and filed on behalf of the plaintiffs.

Whereupon, the plaintiff rests. [132]

The defendant moves to strike Plaintiffs' Exhibit No. 1, and said motion is ordered by the Court denied, and the defendant's demurrer to the evi-

dence is overruled, to which rulings of the Court the defendant excepts.

Defendant moves for judgment in favor of the defendant and against plaintiffs, and said motion is by the Court ordered denied, to which ruling the defendant excepts.

Defendant moves that complaint be dismissed and that judgment for costs be had by defendant, and said motion is by the Court ordered denied, to which ruling of the Court the defendant excepts.

DEFENDANT'S CASE.

Exhibit "A," three volumes Transcript of Testimony, the originals to be withdrawn upon the filing of certified copies, is admitted in evidence and filed.

J. E. Russell is sworn and examined on behalf of the defendant.

C. R. Holton, heretofore sworn and examined, is now examined on behalf of the defendant.

And the defendant rests.

Defendant's motions made at the close of plaintiffs' case are now renewed, and by the Court ordered denied, and the defendant excepts to said ruling of the Court.

All the evidence being in, the case is argued to the Court by counsel for the plaintiffs, defendant submitting its case without argument, and the matter is by the Court taken under advisement, the defendant allowed five (5) days within which to file brief of authorities, and plaintiffs one (1) day thereafter to file answering brief. [133]

Minute Entry of August 28, 1928.

Hon. F. C. JACOBS, United States District Judge, Presiding.

(Court and Cause—L.-272—Prescott.)

ORDER FOR JUDGMENT.

IT IS ORDERED by the Court that order for judgment be entered herein in favor of the plaintiffs, L. A. Clark, and Etta Clark, his wife, in the sum of Ten Thousand Dollars ($10,000.00), together with plaintiffs' costs.

Minute Entry of September 5, 1928.

September, 1928, Term, at Prescott.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.-272—Prescott.)

ORDER RE STAY OF EXECUTION.

IT IS ORDERED by the Court that stay of execution be and hereby is granted for thirty (30) days from and after date of signing the judgment herein.

Minute Entry of September 6, 1928.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.-272—Prescott.)

ORDER EXTENDING TIME IN WHICH TO FILE BILL OF EXCEPTIONS.

IT IS ORDERED by the Court that defendant

be, and hereby is, granted an extension of thirty (30) days from and after this 6th day of September, 1928, in which to file bill of exceptions. [134]

Minute Entry of September 10, 1928.

April, 1928, Term, at Phoenix.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.–272—Prescott.)

ORDER ALLOWING WITHDRAWAL OF FILES.

IT IS ORDERED by the Court that attorneys for the defendant are allowed to withdraw Defendant's Exhibit "A" from the files of the Clerk of this Court in the above-entitled cause, upon proper receipt therefor, for a period of ten (10) days from and after this 10th day of September, 1928.

Minute Entry of September 19, 1928.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.–272—Prescott.)

ORDER GRANTING EXTENSION OF TIME FOR RETURN OF FILES.

On motion of Edwin Greene, Esq., IT IS ORDERED by the Court that attorneys for the defendant be permitted to retain Defendant's Exhibit "A" for five (5) additional days.

Minute Entry of November 5, 1928.

October, 1928, Term, at Phoenix.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.-272—Prescott.)

ORDER FIXING TIME FOR SETTLING BILL OF EXCEPTIONS (NOVEMBER 10, 1928).

IT IS ORDERED by the Court that this case is set for November 10th, 1928, at the hour of ten o'clock A. M., for the settling of the bill of exceptions herein. [135]

Minute Entry of November 10, 1928.

October, 1928, Term, at Phoenix.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

(Court and Cause—L.-272—Prescott.)

RULINGS ON BILL OF EXCEPTIONS.

Le Roy Anderson, Esq., and Leo. Stack, Esq., appear as counsel for the plaintiffs. C. R. Holton, Esq., of counsel, appears as counsel for the defendant, this being the time heretofore fixed for settlement of bill of exceptions herein, and

IT IS ORDERED BY THE COURT AS FOLLOWS:

Paragraphs One to Seven, inclusive, of bill of exceptions allowed;

Paragraphs Eight and Nine are denied;

Paragraphs Ten and Eleven are allowed;

Paragraph Twelve denied, providing plaintiffs add at the close of said paragraph, line 25, page 12, the following: "That defendant thereupon proceeded to and did introduce testimony covering its defense."

Paragraph Thirteen is allowed;

Paragraph Fourteen is denied, providing bill of exceptions is amended to include all evidence in cause 10580 of the Superior Court of Yavapai County, including reporter's notes taken therein, with reference to the nature, character and extent of the injury suffered and sustained by the plaintiff, L. A. Clark, in said cause.

IT IS FURTHER ORDERED that appellant is allowed ten (10) days from this date within which to prepare amended bill of exceptions. [136]

Minute Entry of December 10, 1928.

October, 1928, Term, at Phoenix.

Hon. F. C. JACOBS, U. S. District Judge, Presiding.

[Title of Court and Cause—No. L.-272—Prescott.]

ORDER FIXING TIME FOR SETTLING BILL OF EXCEPTIONS (DECEMBER 15, 1928).

Edwin Greene, Esq., of counsel for the defendant, is present.

IT IS ORDERED that time for hearing and settling the bill of exceptions in this case is hereby fixed for 9:30 A. M., Saturday, December 15th, 1928, this to be the last hearing for settling said bill of exceptions. [137]

[Title of Court and Cause.]

ORDER ENLARGING TIME TO AND INCLUDING JANUARY 25, 1929, WITHIN WHICH TO DOCKET RECORD ON APPEAL IN CIRCUIT COURT.

Good cause appearing therefor and on motion of attorneys for the defendant,—

IT IS HEREBY ORDERED that the time within which the defendant, General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, shall docket the record on appeal of the above-entitled cause from this Court with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended and enlarged to and including the twenty-fifth day of January, 1929.

Dated this 17th day of December, 1928.

(Sgd.) F. C. JACOBS,

Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed Dec. 17, 1928. [138]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the District of Arizona:

The General Accident, Fire and Life Assurance Corporation, Ltd., a corporation, appellant, hereby indicates the following as the portions of the record to be incorporated into the transcript to be forwarded to the Circuit Court of Appeals, Ninth Circuit, on such appeal, to wit:

1. Transcript on removal from the Superior Court of Yavapai County, Arizona, filed April 23, 1928.

2. Plea in abatement and demurrer, filed May 19, 1928.

3. Motion to vacate order for judgment, filed August 9, 1928.

4. Proposed demurrer and answer, filed August 9, 1928.

5. Amended demurrer and answer, filed August 18, 1928.

6. Plaintiffs' motion to strike amended demurrer and answer, filed August 20, 1928.

7. Stipulation waiving jury trial, filed August 20, 1928. [139]

8. Judgment, filed August 28, 1928.

9. Bill of exceptions and order settling and allowing same, filed ————.

10. Petition for appeal, filed November 27, 1928.

11. Assignment of errors and prayer for reversal, filed November 27, 1928.

12. Order allowing appeal, filed November 27, 1928.

13. Supersedeas and appeal bond, filed November 27, 1928.

14. Citation on appeal showing return of service by U. S. Marshal upon attorney for plaintiffs, filed _____.

15. All minute entries in the case.

16. Copy of letter from Messrs. Sloan, Holton, McKesson & Scott to Mr. LeRoy Anderson, attorney for plaintiffs, filed November 14, 1928.

17. This praecipe.

Dated this 5th day of December, 1928.

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for General Accident, Fire & Life Assurance Corporation, Ltd.

We, the undersigned, on behalf of our clients, L. A. Clark and Etta Clark, hereby admit and acknowledge service upon us of the above and foregoing praecipe for transcript of record, this 6th day of December, 1928.

ANDERSON & GALE,
Attorneys for Plaintiffs, L. A. Clark and Etta Clark, His Wife.

Filed Dec. 10, 1928. [140]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of L. A. Clark and Etta Clark, his wife, Plaintiffs, vs. General Accident, Fire and Life Assurance Corporation, Ltd., Defendant, said case being numbered 272 on the Law Docket of the Prescott Division of said Court.

I further certify that the foregoing 140 pages, numbered from 1 to 140, inclusive, constitute a full, true, and correct copy of the record and all proceedings in the above-entitled cause, as called for in the praecipe filed herein, as the same appear from the originals of record and on file in my office as such Clerk; except that the copies herein of papers included in the transcript of record on removal from Clerk of Superior Court of Yavapai County, Arizona, numbered herein as pages 1 to 23, inclusive, are copied from certified copies of same in said transcript from the Superior Court, and not from the originals of said papers. [141]

And I further certify that the cost of the foregoing transcript, amounting to Thirty-one and 15/100 Dollars, ($31.15), has been paid to me by the appellant, General Accident, Fire and Life Assurance Corporation, Ltd.

WITNESS my hand and the seal of said Court this 10th day of January, A. D. 1929.

[Seal] C. R. McFALL,
Clerk, United States District Court, District of Arizona.

By M. R. Malcolm,
Deputy Clerk. [142]

[Endorsed]: No. 5688. United States Circuit Court of Appeals for the Ninth Circuit. General Accident, Fire & Life Assurance Corporation, Ltd., a Corporation, Appellant, vs. L. A. Clark and Etta Clark, His Wife, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed January 14, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5688.

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., a Corporation,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, His Wife,

Appellees.

STIPULATION AS TO PRINTING OF RECORD.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the Clerk of this court in printing the record on appeal herein may omit therefrom the following papers and documents:

Petition for Removal from Superior Court of Yavapai County, Arizona, to United States District Court for the District of Arizona;

Notice of Petition for Removal and attached copies of Petition and Bond;

Bond on Removal to Federal Court;

Order for Removal to Federal Court (both Minute Order and formal written Order for Removal).

it being the purpose and intent hereof to reduce the record to be examined by this Court by excluding therefrom unnecessary papers and to reduce the cost of the printing of said record.

IT IS FURTHER STIPULATED AND AGREED that the jurisdiction of the federal court on removal was not called in question herein nor did it form an issue in said cause.

Dated this 18th day of January, A. D. 1929.

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for Appellant.
ANDERSON & GALE,
Attorneys for Appellees.

[Endorsed]: Stipulation as to Printing of Record. Filed Jan. 21, 1929. Paul P. O'Brien, Clerk.

No. 5688.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., a Corporation,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, his wife,

Appellees.

BRIEF ON BEHALF OF APPELLANT.

SLOAN, HOLTON, MCKESSON & SCOTT,
Attorneys for Appellant.

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No. 5688.

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., a Corporation,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, his wife,

Appellees.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Distrist Court of the United States for the District of Arizona in favor of L. A. Clark and Etta Clark, his wife, and against the General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, for $10,000.00 and costs, entered on August 28, 1928.

The action is based upon a judgment for $15,000.00 and costs alleged to have been recovered by Clark and his wife in the Superior Court of Yavapai County, Arizona, on the 9th day of November, 1927, against one George Ross. It is alleged in the complaint herein that said George Ross was on the 2nd day of July, 1927, duly licensed and permitted by the Arizona Corporation Commission, under the laws of said State, to carry on and conduct a taxi business in the city of Prescott, County of Yavapai, and vicinity, in said state, and owned, maintained, used and operated in connection therewith one certain Paige Sedan automobile. It is further alleged that in order to qualify for said license said Ross was required to and did obtain and file with the Arizona Corporation Commission a policy of indemnity insurance duly written and issued by the defendant in this action, and appellant herein, General Accident, Fire & Life Assurance Corporation, Ltd., by which policy defendant did insure and agree to indemnify said Ross against loss by reason of any liability imposed by law upon him for damages on account of bodily injuries suffered by any person by reason of the ownership, maintenance or use of a Paige Sedan automobile, described therein, and to defend in the name and on behalf of its assured, Ross, any suits brought against him on account of any such happenings.

It is further alleged in said complaint that in conformity with the orders of said Arizona Corporation Commission duly adopted and promulgated said defendant was required to and did attach to said policy of indemnity insurance a special rider or clause. The following is a copy of said rider referred to in the complaint:

"GENERAL ACCIDENT,
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER
ENDORSEMENT

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ....., it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage,

either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workmen's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of policy No. 574373 issued by the GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

FREDERIC W .RICHARDSON,
United States Manager.

Countersigned at Phoenix, Arizona,
Date—February 5th, 1927.
THE STANDARD AGENCY, INC.
M. KINGSBURY, Agent."

Said complaint further alleges that on July 2d, 1927, at the City of Prescott, in said County and State, and while said policy was in full force and effect, said George Ross, the assured, while engaged

in the conduct of said taxi service business and while acting within the scope of his said license and permit, and while in an intoxicated condition drove said Paige Sedan automobile negligently, carelessly and in violation of the traffic rules and regulations of the State of Arizona and the City of Prescott, and crashed and collided with an automobile driven and operated by the plaintiffs, thereby inflicting upon plaintiffs, and each of them, grievous bodily injuries, and that the proximate cause of said accident and injuries to plaintiffs was the negligence and intoxication of said George Ross.

The complaint further alleges that thereafter the plaintiffs, L. A. Clark and Etta Clark, his wife, instituted an action in the Superior Court of Yavapai County, Arizona, being cause No. 10508 therein, against said George Ross to recover damages for and on account of said injuries suffered by plaintiffs as aforesaid in which said action appearance was entered in the name and on behalf of said George Ross by counsel employed by defendant, to-wit: Messrs. Sloan, Holton, McKesson and Scott, of Phoenix, Arizona, and that said counsel, together with other counsel employed by said George Ross, appeared for and represented said Ross throughout said suit; that said cause was tried by said Court with a jury and plaintifffffs recovered a judgment against said Ross for and on account of said bodily injuries alleged to have been suffered by plaintiffs, in the sum of Fifteen Thousand Dollars, together with their costs in said action.

Plaintiffs in their complaint further allege that said judgment recovered by them against said Ross in the Superior Court of Yavapai County, Arizona, is a final valid, subsisting and unsatisfied judgment, and that execution thereof has not been superseded and pray judgment against the General Accident, Fire & Life Assurance Corporation, Ltd., for the full amount thereof, viz., $15,196.35 and for their costs in this action.

Said judgment of the Superior Court of Yavapai County, Arizona, sued upon by plaintiffs herein, is based upon two verdicts returned by the jury in said cause, one being in favor of plaintiffs for $12,000 actual damages, and the other in their favor for $3,000 punitive damages.

Within the time prescribed by law after the recovery by the Clarks of their judgment in said Superior Court and before the bringing of the present action the defendant in said action, Ross, gave notive of appeal therefrom to the Supreme Court of Arizona and filed his bond to perfect said appeal. (See Defendant's Exhibits B, C, D, pages 81-89 Transcript Record.)

The General Accident, Fire & Life Assurance Corporation, Ltd., the defendant and appellant herein, appeared in the suit in Federal Court and filed a plea in abatement in which it alleged that if George Ross did obtain and file with the Arizona Corporation Commission the policy of insurance mentioned in the complaint and if said special rider or clause was attached as alleged, providing that

said policy should inure to the benefit of any and all persons suffering loss or damage, that all benefits conferred by said rider or clause upon persons suffering loss or damage were conditioned upon the recovery by said persons of a final judgment against the assured named in said policy, and that the right or benefit of any person or persons so injured was subject to all of the terms, conditions and agreements contained in said policy.

The defendant further alleged in its plea in abatement that if said L. A. Clark and wife instituted said action in said Superior Court, and if the same was tried and a judgment recovered against Ross as alleged by plaintiffs, that said judgment was not a final judgment as contemplated by the special rider so attached to said policy of insurance, or as contemplated by the rules and regulations of said Arizona Corporation Commission, or as contemplated by the laws of the State of Arizona in such case made and provided. Pleading further by way of abatement, the insurance company set up that if there was a judgment as alleged, that an appeal had been perfected therefrom and was then pending before the Supreme Court of the State of Arizona and that said judgment would not become final as contemplated by law and by said contract and rider and by the rules and regulations of the Arizona Corporation Commission until said appeal had been heard and the issues thereof determined by said Supreme Court. The defendant also demurred generally to the complaint.

Upon the hearing on the plea and abatement and demurrer the trial Court denied the plea, overruled the demurrer and summarily ordered judgment entered against defendant for $15,000. Said order for judgment was later on motion of defendant vacated as being contrary to the rules of court regarding amendments and defendant given leave to answer herein. Defendant demurred generally to the complaint and also filed its answer. Thereafter and a few days before the trial defendant tendered and filed its Amended Demurrer and Answer, in which, in addition to admitting and denying certain allegations of the complaint, defendant alleged that the limit of its liability expressed in said policy issued to said George Ross was the sum of Five Thousand Dollars for bodily injuries or death to any one person. Further answering the complaint the defendant set out verbatim the clause or rider attached to the policy in conformity with the order of the Arizona Corporation Commission, and heretofore set forth in the Statement of the Case, and plead that defendant had received no written notice from the plaintiffs, or either of them, within twenty days from the date of suffering said loss or damage, if any, as provided in said indorsement, or at all, claiming any loss or damage under said policy or any policy issued by defendant.

In its said amended answer the defendant further alleged that said policy of insurance contained among others, the following provision:

> "STATEMENT 8. Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00) and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00)."

and that under said provision the limit of liability of defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars, and further plead as to whether the plaintiffs herein, or either of them, were injured in an accident occasioned by the automobile covered by said policy, or the extent or amount of injuries, if any, to said plaintiffs, or either of them, defendant was without information upon which to base a belief and therefore denied that plaintiffs, or either of them, were injured in any accident covered by said policy. Leave to file said Amended Answer was, however, refused by the Court for the grounds stated in the Bill of Exceptions.

The case was tried at Prescott, Arizona, on August 18, 1928, before the Honorable F. C. Jacobs, Judge presiding without a jury, a written stipulation waiving jury having been entered into by the parties and filed. (Transcript of Record, p. 32). At the conclusion of the trial the case was taken under advisement and on August 28, 1928, the

Court ordered judgment in favor of the plaintiffs against the defendant in the sum of $10,000 and costs. From said judgment the defendant has appealed to this Court.

ASSIGNMENT OF ERRORS.

FIRST.

The Court erred in overruling and denying defendant's Plea in Abatement herein upon the grounds and for the reasons following, to-wit:

That the complaint seeks to enforce as against the defendant herein under the indemnity clause of a certain policy of indemnity insurance issued to one George Ross, defendant in an action in the Superior Court of Yavapai County, Arizona, a judgment alleged to have been rendered and entered therein in the amount of $15,000 against said Ross for damages arising out of an automobile accident in which the automobile alleged to have been covered by said insurance policy was involved. That the right of the plaintiffs to claim under said insurance policy arises solely out of a special rider or clause attached to said policy providing that said policy should inure to the benefit of any and all persons suffering loss or damage, which right was under the terms of said clause, conditioned upon the recovery by said person of a final judgment against the person assured in said policy of indemnity insurance, namely George Ross.

If judgment was recovered against Ross as alleged in plaintiffs' complaint, nevertheless the de-

fendant contends that such judgment has not become a final judgment as contemplated by the clause or rider attached to said policy. The defendant set up in its plea in abatement and proved that from the judgment of the Superior Court of Yavapai County, Arizona, an appeal to the Supreme Court of the State of Arizona had been duly and regularly perfected and was at the time of the trial of said Plea in Abatement pending in said Supreme Court. Defendant contends that the purport and intent of the special rider or clause attached to the indemnity insurance policy is that in the event the injured person shall have recovered a final judgment in which all of the issues of the case have been finally and conclusively adjudicated, then and in that event only may such injured claim the benefit of the indemnity clause in said insurance policy and avail himself thereof. That the Court should, upon the proof of the pendency of said appeal, have granted the plea in abatement abating and staying this action until a final determination of the issues involved in said appeal pending before said Supreme Court of the State of Arizona, and erred in refusing so to do.

SECOND.

The Court erred in refusing defendant leave to file its Amended Demurrer and Answer, which said Amended Demurrer and Answer did, in addition to the defenses set up in the original demurrer and answer, demurred to the complaint upon the ground that there were several causes of action improperly

united, and did set up in said Amended Answer, in addition to the defenses set up in the original answer, the following defenses:

"I.

That the policy of insurance herein referred to contained, among other things, the following provision:

'GENERAL ACCIDENT
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER
ENDORSEMENT
Not Valid Unless Countersigned
by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ....., it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall

pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at leasat ten days prior to the cancellation of such policy . PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workmen's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. 574373 issued to the GENERAL

ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

Countersigned at Phoenix, Arizona.

Date—February 5th, 1927.

THE STANDARD AGENCY, INC.
M. Kingbury, Agent.
FREDERIC W. RICHARDSON,
United States Manager.

II.

That this defendant has received no written notice from the plaintiffs, or either of them, within twenty days from the date of suffering said loss or damage, if any, as is provided in said indorsement, or at all, claiming any loss or damage under said policy or any policy issued by this defendant.

As a further and separate defense to said action defendant alleges:

I.

That said policy of insurance heretofore referred to contained, among others, the following provision:

'STATEMENT 8: Regardless of the number of the assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from

any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00).'

II.

That under said provision the limit of liability of this defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars ($5,000.00). As to whether the plaintiffs herein, or either of them, were injured in an accident occasioned by the automobile covered by said policy of insurance herein referred to, or the extent or amount of injuries, if any, to said plaintiffs, or either of them, this defendant is without information upon which to base a belief and therefore denies that said plaintiffs or either of them, were injured in any accident covered by said policy herein referred to."

The defendant charges error upon the following grounds and for the following reasons, to-wit: For the reason that said Amended Demurrer and Answer set up grounds of demurrer and matters of defense not contained in said original demurrer and answer. That by refusing to permit the filing of said amended Demurrer and Answer the defendant was deprived of a substantial right.

THIRD.

The Court erred in receiving in evidence Plaintiffs' Exhibit No. 1, said Exhibit purporting to be a copy of the printed Abstract of Record in the Su-

preme Court of the State of Arizona in the appeal of cause No. 10580 from the Superior Court of the County of Yavapai, State of Arizona, over the objection of defendant that the same was incompetent, irrelevant and immaterial and did not contain the original nor any copy of the pleadings or judgment in said cause No. 10580, certified to under the hand and seal of the lawful possessor of such records as required by the statutes of the State of Arizona as a prerequisite to their admission as evidence of the contents thereof, and that said Exhibit 1 was not the best evidence or any competent evidence of the matters and things attempted to be shown thereby and did not conform to the law with reference to the manner and mode of proving official documents and court records within the State of Arizona. Defendant assigns the foregoing as error for the following reasons and upon the following grounds, to-wit: That the proof of the judgment and pleadings in said cause No. 10580 was essential to a recovery in the caase at bar and that said instrument so admitted in evidence did not constitute any proof thereof.

FOURTH.

The Court erred in receiving in evidence over the objection of the defendant, a policy of insurance written by the General Accident, Fire & Life Assurance Corporation, designated as "Plaintiffs' Exhibit No. 2," which said policy of insurance did by its terms agree to indemnify one George Ross, of

the Town of Prescott, County of Yavapai, State of Arizona, for the period beginning February 5, 1927, and ending December 31, 1927, on account of damages sustained by persons other than employees by reason of the ownership, maintenance or use of one certain automobile alleged to be owned by said Ross, known as a Paige 5 Passenger, 6 Cylinder Sedan, built in the year 1926, Motor No. 417333, Serial No. 409495, for the reason that no proper foundation had been laid for the reception of said document in evidence in that it had not been shown that the automobile described in said policy was the automobile referred to in plaintiffs' complaint.

FIFTH.

The Court erred in receiving in evidence upon the trial an instrument designated "Plaintiffs' Exhibit No. 3" over the objection of the defendant, which said instrument was in words and figures as follows, to-wit:

"July 7th, 1927.

Mr. B. F. Hunter,
C/o Standard Accident Ins. Co.,
Phoenix, Arizona.
Dear Mr. Hunter:—

I have further investigated the Clark-Ross automobile collision, and Mrs. Clark is really in a bad way. There were reports current on the street last night that she had died, but this, I find this morning, to be untrue. However, she is running a very high temperature, with

frequent hemorrhages, and it is quite apparent that she is going to have a bad time of it.

They had very high opinions as to what they should recover and want me to file suit for Fifteen Thousand Dollars. I believe there is a better chance to settle now than any other time because the woman is seriously ill. She is really in bad shape from her disease, as well as the accident. I believe if you will make me a firm offer of Twenty Five Hundred Dollars ($2500.00) I can get a settlement out of them, for both. This not to include anything for the automobile,—simply to cover the personal injury to Clark and Mrs. Clark, their doctor and medical attendants. This is the very best that I can possibly hope to do, and if we cannot get together on that basis, as reluctant as I am to bring suit against you, I will have to file suit against Ross for the Fifteen Thousand Dollars, and I think the chances of getting a substantial verdict against him is very good.

Please let me know at your early convenience,

Very truly yours,

ANDERSON & GALE.

By

LA-c

Plts Exhibit No. 3
Marked for Identification Only
Case No. Law 272 Pct.
Pltfs. Exhibit No. 3
Admitted and filed Aug 20 1928
C. R. McFall, Clerk
By Paul Dickason
Chief Deputy Clerk
Case No, Law 272 Prescott
Clark v. General Accident."

Error is assigned upon the admission of the foregoing instrument in evidence upon the ground and for the reasons following to-wit: That said letter did not show or purport to show that B. F. Hunter was an accredited agent, or any agent of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon herein and that said letter did not constitute notice to defendant company as provided by the terms of said policy and was, therefore, incompetent, irrelevant and immaterial.

SIXTH.

That the Court erred in receiving in evidence upon the trial hereof, as Plaintiffs' Exhibit No. 4, over the objection of the defendant, the following letter:

"THE STANDARD AGENCY, INC.
formerly Carl H. Anderson Insurance Agency
General Agents
INSURANCE AND SURETY BONDS
Phoenix, Arizona

Fire	Workmen's Compensation
Atomobile	Accident and Health
Public Liability	Fidelity and Surety Bonds
Plate Glass	
Burglary	
Elevator	

July 11, 1927

Adams Hotel Bldg. 16 E. Adams St.
Telephone 23101.

Mr. Leroy Anderson
Prescott, Arizona.

Dear Mr. Anderson: Re: Clark-Ross Collision

Thanks for your prompt letter of the 7th inst. with reference to the above matter. We note, with regret, that Mrs. Clark is running a high temperature and has frequent hemorrhages, but wonder whether these conditions are attributable to the accident and whether they did not exist even prior to the accident.

We sincerely trust that the suit referred to by you will be withheld, at least until we have had an opportunity to perhaps more fully acquaint ourselves with her present condition and to what extent her present condition is attributable to the accident. We note that you are inclined to be entirely reasonable in the matter, but we do feel from the information at present in hand, that $2500 would be out of proportion to the injury. May we ask your consent to communicating with Dr. Flynn for a full and

complete report along the above lines, when we will likely be in a position to advise further concerning the $2500 offer.

Yours very truly,
STANDARD AGENCY, INC.
By B. F. Hunter.
B. F. HUNTER, Adjuster.

BFH:PW
Pltfs Exhibit No. 4
Marked for Identification Only
Case No. Law 272 Pct.
Pltfs Exhibit No. 4
Admitted and Filed Aug 20, 1928
C. R. McFALL, Clerk
By Paul Dickason
Chief Deputy Clerk
Case No. Law 272 Pct.
Clark v. General Accident."

Error is charged upon the reception of said letter in evidence upon the following grounds and for the following reasons, to-wit: That said letter did not show or purport to show that the said B. F. Hunter was an accredited agent or representative, or any agent or representative of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon, aand that no evidence whatever had been introduced by plaintiff that said B. F. Hunter was in truth and in fact an agent of the defendant corporation authorized to represent or bind said defendant corporation in any manner whatsoever, and that said letter was wholly irrelevant and immaterial and

was not competent evidence of any fact material to the issues of this case.

SEVENTH.

The Court erred in denying defendant's motion made at the close of plaintiffs' case to strike Plaintiffs' Exhibit No. 1, said Exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of the State of Arizona in the appeal of cause No. 10580 from the Superior Court, County of Yavapai, State of Arizona. Error is charged upon the following grounds and for the following reasons, to-wit: That the offer of said Exhibit was for the avowed purpose of proving the judgment and pleadings in cause No. 10580 in the Superior Court of the County of Yavapai, State of Arizona. That said Exhibit was not nor did it purport to be a true copy of said pleadings and judgment, certified to by the officer having the custody and charge thereof. That said Exhibit did not constitute competent evidence tending to prove or disprove any issue in this case.

EIGHTH.

The Court erred in overruling defendant's demurrer to the evidence at the close of plaintiffs' case, that is to say, defendant's demurrer that the evidence and all of it introduced by plaintiffs in support of their complaint failed to prove facts sufficient to entitle the plaintiffs to a judgment under their complaint. The defendant charges that

such ruling was erroneous for the following reasons and upon the following grounds, to-wit: That the evidence at the close of plaintiffs' case wholly failed to show that the automobile concerned in the accident complained of in said cause No. 10580 was the identical automobile designated and described in the policy of insurance sued upon in this action. That the evidence at the close of plaintiffs' case wholly failed to show the performance of the condition named in the rider or endorsement upon the insurance policy sued upon, that is to say, that the person suffering loss or damage in order to avail himself of the benefits of said policy and endorsements thereon, should within twenty days from the date of suffering said loss or damage serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Ltd., at its office at Phoenix, Arizona. That there was wholly lacking in the evidence any proof of the performance of the condition above set forth.

NINTH.

The Court erred in overruling defendant's demurrer made at the close of plaintiffs' case that it appeared from the evidence that there were two causes of action improperly united in the complaint. Error therein is charged upon the following grounds and for the following reasons, to-wit: That the policy of insurance sued upon herein in express language provided as follows:

"STATEMENT 8: Regardless of the number of the assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00)."

That it appeared from the evidence that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. That under the foregoing facts there were two causes of action improperly united in a single cause of action.

TENTH.

The Court erred in denying defendant's motion made at the close of plaintiffs' case for judgment in favor of the defendant and against the plaintiffs. Error is predicated therein upon the following grounds and for the following reasons, to-wit: The evidence at that stage of the case failed to show what, if any, amount each of the plaintiffs was entitled to recover. The injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action. That two causes of action were improperly united in that the policy of insurance

introduced in evidence did not give the right to plaintiffs to recover jointly but limited each to the amount of his or her injury, but not to exceed Five Thousand Dollars ($5,000.00) each, and there was no showing as to what damages were sustained by each of said plaintiffs. That the plaintiffs wholly failed to establish by the evidence the facts necessary to entitle them to recover under the terms of the policy upon which they were suing.

ELEVENTH.

That the Court erred in sustaining the objection of counsel for plaintiffs to the following question asked of defendant's witness J. E. Russell, concerning certain statements alleged to have been made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in cause No. 10580 in the Superior Court of Yavapai County, Arizona:

> BY MR. HOLTON:
>
> Q. I will ask you whether you recall Mr. Anderson, attorney for the plaintiffs, making any statement in his argument to the jury with respect to the amount of damages for Mr. Clark? To the best of your recollection will you testify and tell the Court what that statement was?

Error is predicated upon the following grounds and for the following reasons, to-wit: That counsel for the defendant did, following such question, avow that he intended to prove by the witness Russell

that Mr. Anderson, attorney for the plaintiffs in cause No. 10580 in the Superior Court of Yavapai County, Arizona, in his argument to the jury, said in substance, that he was claiming no damages on behalf of Mr. Clark in that action. That defendant, as throwing light upon the right of the Court to allow damages for personal injuries to L. A. Clark under the policy of insurance sued upon herein, had a right to show that no claim was made in said cause No. 10580 for such damages and that if the plaintiff L. A. Clark was injured in any manner whatsoever the plaintiffs by their counsel waived any such damages and that, as a matter of fact, no damages were awarded in said cause No. 10580 on account of personal injuries received by L. A. Clark.

TWELFTH.

The Court erred in sustaining the objection of counsel for plaintiffs to the following question asked of the defendant's witness C. R. Holton; concerning what statements were made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in said cause No. 10580 in the Superior Court of Yavapai County, Arizona:

BY MR. SCOTT:

Q. What did he (Anderson) say with respect to the amount of damages claimed by Mr. Clark?

Error is predicated upon the following grounds and for the following reasons: That counsel for the defendant did avow at the time of the propounding of said question, that he intended to prove by said witness that Mr. Anderson, counsel for the plaintiffs in cause No. 10580, in his argument to the jury said in substance that he was not asking for any damages for any injuries sustained by L. A. Clark in the accident concerned in said cause. That defendant had a right to show that if L. A. Clark sustained any injuries whatsoever in the accident complained of in said cause No. 10580, that he was not asking for any damages therefor and that by the statement of his counsel made in the argument of said cause, he waived any such damages.

THIRTEENTH.

The Court erred in overruling defendants' demurrer to the evidence at the close of the case upon the ground that said evidence wholly failed to entitle plaintiffs to recover in this action. Error is predicated upon said ruling upon the grounds and for the reasons following: That the evidence in the case wholly failed to show that the automobile concerned in the accident complained of in cause No. 10580 was the identical automobile designated and described in the policy of insurance sued upon in this action. That said evidence wholly failed to show the performance of the condition named in the rider or endorsement upon the insurance policy

sued upon, that is to say, that the person suffering loss or damage, in order to avail himself of the benefits of said policy and endorsements thereon, should within twenty days from the date of suffering said loss or damage, serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Ltd., at its office at Phoenix, Arizona. That there was wholly lacking in the evidence any proof of the performance of the condition above set forth. That the evidence wholly failed to show what, if any, personal injury was received by plaintiffs or either of them.

FOURTEENTH.

The Court erred in overruling defendant's demurrer at the close of the case that it appeared from the evidence that there were two causes of action improperly united in the complaint. Error therein is charged upon the following grounds and for the following reasons, to-wit: That the policy of insurance sued upon herein in express language provided as follows:

> "STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.-00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily in-

juries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00)."

That it appeared from the evidence that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. That under the foregoing facts there were two causes of action improperly united in a single cause of action.

FIFTEENTH.

The Court erred in denying defendant's motion made at the close of the entire case for judgment in favor of the defendant and against the plaintiffs. Error is predicated upon the following grounds and for the following reasons, to-wit: The evidence at that stage of the case failed to show what, if any, amount each of the plaintiffs was entitled to recover. The injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action. That two causes of action were improperly united in that the policy of insurance introduced in evidence did not give the right to plaintiffs to recover jointly but limited each to the amount of his or her injury, but not to exceed Five Thousand Dollars ($5,000.00), each, and there was no showing as to what damages were sustained by each of said plaintiffs. That the plaintiffs wholly failed to establish by the evidence the

facts necessary to entile them to recover under the terms of the policy upon which they were suing.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

Appellant's first Assignment of Error charges error on the part of the trial court in denying its Plea in Abatement setting up the pendency of the appeal from the judgment of the Superior Court of Yavapai County in favor of the Clarks and against George Ross. The rider or clause attached to the policy issued by the defendant company to Ross under which plaintiffs are claiming, is again set out for the convenience of the Court in connection with this Assignment:

"GENERAL ACCIDENT
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER
ENDORSEMENT

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No....., it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the

benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, *if final judgment is rendered against the assured* by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workmen's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of policy No. 574373 issued by the GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

FREDERIC W. RICHARDSON,
United States Manager.

Countersigned at Phoenix, Arizona,
Date—February 5th, 1927.
THE STANDARD AGENCY, INC.
M. KINGSBURY, Agent."
(Italics ours)

It will be noted that any right or benefit sought to be asserted by an injured person under the clause or rider just set forth is dependent entirely upon the condition "if final judgment is rendered against the assured by reason of any loss or claim covered by this policy."

It was the contention of defendant in the court below, and we believe it to be the law, that a "final judgment means the final settling of the rights of the parties to the action beyond all appeal.

Dean v. Marshall, 35 N. Y. S. 724;
Blanding v. Sayles, 49 Atl. 992;
Bixler's Appeal, 59 Cal. 550;
Annis v. Bell, 64 Pac. 11.

In the absence of some statutory provision, no proceedings dependent on a judgment of the court can be taken until final adjudication, which means

determination by the last court whose jurisdiction has been legally invoked.

Wallace v. Adams, 243 S. W. 572.

The case of Fidelity & Causalty Co. v. Fordyce, 41 S. W. 420, is exactly in point here and for that reason we quote at length the decision of the Court:

> "BATTLE, J. Two actions were commenced by S. W. Fordyce and Allen N. Johnson, receivers of the City Electric Street Raiilway, against the Fidelity & Causalty Company and the Union Guaranty & Trust Company (which were afterwards, by consent, consolidated and heard as one action) on a policy executed by the Fidelity & Causalty Company to the City Electric Street Railway Company, to recover the amounts of judgments rendered against the street railway company for damages resulting from personal injuries caused by the operation of its railway between the 9th of December, 1891, and the 9th of December, 1892. The portions of the policy upon which these actions were based, and which affect plaintiff's right of recovery, are as follows:
>
> > 'It is hereby agreed as follows: That the company (the Fidelity and Casualty Company) will pay to the insured (the City Electric Street Railway Company) or their legal representatives any and all such sums as the insured may become liable for in damages in consequence of bodily injuries suffered by any person or persons whomsoever while traveling on the railroad

of the insured, or otherwise, in connection with the operation of said road, during the period covered by the premium paid; that is to say, between the ninth day of December, 1891, and the ninth day of December, 1892, at noon, or by any renewal premium.

'(1) The company's liability for a casualty resulting in injuries to or death by any one person is limited to fifteen hundred dollars, and, subject to the same limitation for each person, their gross liability for several persons injured or killed in any one casualty is ten thousand dollars.

'(2) If any legal proceedings are taken against the insured by any person or persons injured as aforesaid to enforce a claim for indemnity for such injuries, then the company (the Fidelity and Casualty Company) shall, at their own cost and expense, have the absolute control of defending the same throughout in the name and on behalf of the insured; but, if the company shall offer to pay the insured the full amount insured, then they shall not be bound to defend the case, nor be liable for any costs or expenses which the insured may incur in defending such case.

'Provided, always, that this policy is subject to the condition and agreements indorsed hereon, which are made part of this contract,' a part of which is as follows:

'(1) Upon the occurrence of an accident in respect to which a claim may arise, notice thereof shall be immediately given

by the insured to the company at their office in New York, and to whomsoever shall have countersigned their policy. The insured shall also furnish the company full information in relation to the accident.

'(2) On receiving from the insured notice of any claim, the company may take upon themselves the settlement of the same, and in that case the insured shall give all reasonable information and assistance necessary for that purpose. The insured shall not, except at his own cost, settle any claim or incur any expense without the consent of the company.'

The defendants answered, and admitted the execution of the policy, but 'denied that it agreed to pay all sums for which the railroad company might be liable, and averred that the Fidelity & Casualty Company only agreed to indemnify and reimburse the said railway company for any and all sums it might pay on account of said injuries, not exceeding fifteen hundred dollars in any one case.

'They admitted the judgments set up in the complaints but averred that the Fidelity & Casualty Company was not liable to pay the same, because the City Electric Street Railway Company had not paid them, but only paid money into the registry of the United States court, and was not damaged by such deposit, within the meaning of the policy of insurance.

'They denied the liability of the Fidelity & Casualty Company, because it had the

right to control the litigation, and was then contesting the liability of the railway company in the supreme court, and such suits had not been determined by the said supreme court,'

The issues were tried by the court, sitting as a jury, upon the pleadings, exhibits, and an agreed statement of facts, a part of which is as follows:

'It is agreed between the parties to this case that on the 12th day of July, 1892, one Arthur Connery received personal injuries, on account of which he brought suit against the City Electric Street Railway Company for damages which were alleged to have been occasioned in the operation of the road of said railway company in Little Rock.

'That on the same day one Russell Yates received injuries by being burned by a telephone wire which was alleged to have been in contact with a live trolley wire of the said street railway company in said city, to recover damages for which he brought suit against the said street railway company.

'That on the 30th day of October, 1892, one W. H. H. Riley was injured by being run over by a car of the said railway company in said city, on account of which he instituted an action against the said street railway company.

'On the 15th day of February, 1892, one Lawrence Levy was run over and killed by the cars of the street railway company

in said city, and the administrator of said estate brought suit to recover damages occasioned to the next to kin, and also to the estate of said Lawrence Levy, by reason of said killing.

'That on the ..... day of April, 1892, one S. W. Davies was injured while alighting from the cars of the said street railway company in said city, and to recover the damages occasioned thereby he brought suit against the street railway company.

'The notice of the bringing of each of said suits was duly given to the Fidelity & Casualty Company, and it appeared to each suit by its attorney, and defended the same.

'That such proceedings were had in the case of Arthur Connery on the 9th day of December, 1892, that judgment was duly rendered in his favor for the sum of $300, to bear interest from date at the rate of six per cent. per annum, and for $37.60 costs therein expended.

'That in the action of Peter Yates a judgment was on the 3d day of June, 1893, rendered for the sum of $1,000 with interest from date at six per cent., and $28.05 costs.

'That in the case of W. H. H. Riley a judgment was on the 3d day of April, 1894, rendered for $5,000, with interest from date at six per cent. per annum, and the sum of $33.95 costs of suit.

'That in the case instituted by Kaufman Levy a judgment was on the 28th day of

May, 1892, rendered for plaintiffs for $1,500, with interest from date at six per cent. per annum, and for costs amounting to $57.95.

'That in the case of S. W. Davies a judgment was rendered on the 7th day of December, 1894, for $100, with interest from date at six per cent. per annum, and costs amounting to $14.75.

'That in the cases of Arthur Connery and Peter Yates appeals were taken to the supreme court of the state, without supersedeas, which are now pending there.

'That, in the cases brought by Kaufman Levy and W. H. H. Riley, appeals were likewise taken to the supreme court, which have been heard, and the judgments of the circuit court have been affirmed.

'That in the case of S. W. Davies no appeal was taken.

Upon this statement of facts the defendant asked declarations of law to the same effect as they answered, but the court refused to so declare, but declared as follows:

'The court declares the law on these facts in favor of the plaintiff. The several judgments are prima facie evidence of the liability of the plaintiff, and the defendant company's obligation is to pay all such sums as the insured may become liable for in damages. Their obligation, therefore, attaches as soon as the judgments are recovered. The plaintiffs are entitled to judgment for the amounts set forth, subject to the limitations of the bond;' and rendered

judgment against the defendants for $5,113.80.

The defendants endeavored to defeat a recovery by the plaintiff in this action upon two grounds: (1) The railway company had not paid the judgments recovered against it; and (2) because appeals from the judgments of the circuit court to the supreme court in two or more of the cases were pending. The question for our decision is, are these grounds tenable?

According to the terms of the policy, the insurance company, which was the Fidelity & Casualty Company, undertook to pay all such sums as the railway company should become liable for in damages in consequence of bodily injuries caused by the operation of its street railway. Upon the occurrence of an accident in respect to which a claim for damages might have arisen, notice was required to be immediately given by the railway company to the insurance company. The former was forbidden to settle such claim or incur any expense without the consent of the latter company. The insurance company assumed the liability for such a claim, and had authority to settle it without litigation. If any legal proceedings were instituted against the railway company to enforce it, the insurance company bound itself to take absolute care and control of defending against the same in the name and in behalf of the assured. In only one way could it have absolved itself from this obligation, and that was by paying or offering to pay the assured the full amount for which it was liable in such cases by its policy. According to these terms,

the ascertainment and adjustment of the liability of the insured for claims for damages depended on the insurance company, provided it acted in good faith. The assured surrendered the entire control and management thereof to the insurer. So long as the latter resisted in the courts the enforcement of such claims, no right of action accrued upon its policy; for until the termination of the litigation both parties to the policy denied the liability of the assured, and the existence and extent thereof remained undetermined according to the methods by which the parties, in effect, agreed it should be ascertained and fixed. Any other interpretation of the policy would take from the insurer the protection for which it contracted.

In short, our conclusion in this case is that, when the amount of the liability of the railway company for damages in consequence of bodily injuries caused by the operation of its railway was determined, the Fidelity & Casualty Company became bound by its policy to pay so much thereof as does not exceed the sum it agreed to pay in such cases, although it was not paid by the assured (Insurance Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051), but that the same was not determined so long as the action therefor was pending in court, or an appeal from the judgment thereon, was pending in the supreme court.

So much, therefore, of the judgment in this action as embraces the amounts recovered for injuries received by W. H. H. Riley, Lawrence Levy, and S. W. Davies, and costs of the re-

covery, is affirmed; and as to the remainder it is reversed, and the action therefor is dismissed, without prejudice."

We feel that the case of Schroeder v. Columbia Casualty Co., 213 N.Y.S. 649, is also squarely in point on this proposition. There the Court said:

"The gist of the defense interposed by the defendant is that an appeal has been taken from the judgment, which is still undetermined; that such an appeal is being diligently prosecuted, and that liability 'imposed by law' will not become fixed until termination of such appeal. It contains no allegations that execution had not been returned unsatisfied, or that the judgment debtor is solvent. On the contrary, I am satisfied, from the proof submitted by the plaintiff, that the insolvency of the judgment debtor has been established, and that the return of execution unsatisfied was by reason of such insolvency. It further appears, without dispute, that the defendant has filed no bond to stay execution but has otherwise perfected the appeal. In these circumstances the plaintiff argues that she has established her right to maintain this action, that the defense interposed is without merit, and that the defendant's liability at this time is fully established.

"With this contention of the plaintiff I cannot agree. Under the policy the insured was required to co-operate with the company in the defense of the action and in any appeal. In such circumstances, the insured, had it been

solvent, would not, I think, be permitted to refuse to co-operate in the appeal, but instead pay the judgment and bring action at this time against the defendant. In the circumstances I do not see how the plaintiff in this action can claim greater rights than the assured would have. Roth v. National Automobile Mutual Casualty Co., 202 App. Div. 667, 195 N. Y. S. 865; Schoenfield v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606. On the appeal the judgment now sought to be enforced may be reversed. If such were the outcome of the appeal, the defendant might find itself without recourse against a plaintiff financially irresponsible.

"My conclusion is that the 'liability imposed by law,' provided for in the policy, has not yet been fixed, and will not be so fixed until all appeals the defendant sees fit to take have been finally determined."

Under its policy issued to George Ross the appellant agreed, as did the casualty company in the case last cited, "To Indemnify the Assured, named and described in Statement 1 of the Declarations forming part hereof (George Ross), against loss by reason of the liability imposed by law upon the Assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered" while the policy was in effect by reason of the ownership, maintenance or use of the automobile therein described.

In this regard we particularly call attention to the decision of this Court in Wolf v. District Court

in and for the Northern District of California, Second Division, 235 Fed. 69, wherein it was said (Judge HUNT writing the opinion):

> "It appears that the Supreme Court of the state of California has not yet acted upon an appeal in case No. 50811 taken from the judgment of the lower state tribunals, and inasmuch as that court will apparently be called upon to decide the issues tried in the action to quiet title, it is clear to us that the federal court ought, at least at this time, to decline to proceed with the case before it. By proceeding in the federal court a judgment might be rendered which would be in conflict with the one rendered by the state court, and create that confusion deprecated by the Supreme Court where attempts have been made to transfer matters standing for judgment in the one court to the other."

We submit that the District Court erred in overruling the plea in abatement and in refusing to stay proceedings in the cause in the Federal court until a determination had been had of the appeal then pending in the Supreme Court of Arizona.

It may be just as well at this point to announce that the Supreme Court of the State of Arizona on February 12, 1929, rendered its decision in the appeal from the judgment here sued upon, whereby the plaintiffs in that case, appellees here, were given the option of remitting a portion of the judgment or the case would by the order of such

Supreme Court be reversed and remanded for a new trial; also that the plaintiffs filed the remittitur suggested by the Supreme Court and the original judgment upon which plaintiffs brought this suit is now dead and a new and different judgment has been rendered and entered by the Superior Court which gave the original judgment sued upon. In view of the foregoing action of the Arizona Supreme Court and its mandate issued to the lower court, the judgment of the District Court in this case has been rendered nugatory. We will in more detail discuss the decision of that Court and its effect upon this case in a subsequent assignment.

We think the principle enunciated by Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 182, 4 Sup. Ct. 358, 28 L. Ed. 390, is applicable here:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience."

We submit that in matters of concurrent jurisdiction the court to which jurisdiction first attaches

holds the case to the exclusion of the other until the final determination of the matters in dispute.

Pickens v. Roy,
187 U. S. 177,
23 S. Ct. 78,
47 L. Ed. 128,
affirming Pickens v. Dent,
106 Fed. 653,
45 C.C.A. 522.

We quote the following from Pickens v. Dent, supra, which was affirmed by the Supreme Court of the United States:

> "The course to be pursued has been well defined in cases in which there is a conflict as to jurisdiction between the state and federal courts. Briefly stated, the rule is this: Considering the peculiar character of our government, and keeping in view the forbearance which courts of co-ordinate jurisdiction exercise towards each other, it follows that the court which first obtains rightful jurisdiction over the subject-matter of a controversy must by all other courts be permitted to proceed therein to final judgment. The federal courts will not interfere with the administration of affairs lawfully in the custody and jurisdiction of a state court, nor will they permit the courts of the states to interfere concerning litigation rightfully submitted to the decision of the courts of the United States."

We respectfully contend that upon the introduction of proof of the pendency of such appeal from

said judgment to the Supreme Court of Arizona by exemplified copies of the notice of appeal, bond and certificate of the Clerk of said Supreme Court that said appeal had been perfected, was then in good standing and undisposed of, (Pages 81-89 Transcript Record) it became the duty of the court below to grant said plea and stay proceedings herein until a determination had been had of said appeal and that its refusal so to do constituted resersible error.

SECOND ASSIGNMENT OF ERROR.

The appellant alleges error upon the refusal of the court to permit the filing of its amended demurrer and answer, which said amended demurrer and answer in addition to the defenses set up in the original demurrer and answer, demurred to the complaint upon the ground that there were several causes of action improperly united, and set up in addition to the defenses plead in the original answer, the defense that no written notice from plaintiffs or either of them, had been given as provided in said clause or rider, and further that under the provisions of said policy the limit of liability of defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars. Defendant alleged that it was without information upon which to base a brief as to whether plaintiffs, or either of them, were injured in an accident occasioned by the automobile covered by said policy, or the extent or amount of injuries,

if any, to plaintiffs or either of them, and therefore denied that plaintiffs, or either of them, were injured in any accident covered by said policy.

In connection with defendant's application for leave to amend its answer the following pertinent facts are to be noted: On May 19, 1928, defendant filed its plea in abatement and a demurrer to the complaint. It naturally refrained at that time from answering to the merits because of the holding of many respectable authorities to the effect that by so doing it would constitute a waiver of its plea in abatement. As heretofore stated, the plea was denied on August 6, 1928, and judgment summarily entered against defendant for $15,000 without leave to answer. This judgment was on motion of defendant vacated on August 13, 1928, being just one week later, as having been entered contrary to Rules 15 and 20 of the Rules of Practice of the District Court of the United States for the District of Arizona, pertaining to amendments as of right upon the overruling of pleas and demurrers, and defendant was given leave to answer. On the same date (August 13, 1928), the case was ordered set for trial on the following Monday, or August 20, 1928. It is to be noted that the order vacating the judgment and allowing defendant to answer prescribed no particular time for so doing. With its motion to vacate said premature judgment the defendant had tendered an answer which was filed on August 9, 1929. At the time of the preparation of said answer the member of the firm of attorneys

representing defendant and handling the defense of said action was in California and same was prepared by others unfamiliar with the case as a whole and upon more mature consideration it was perceived that certain vital defenses had been overlooked in the hurriedly prepared answer. Consequently an Amended Demurrer and Answer embodying a complete defense to the action was prepared and filed several days before the trial date. As no time was specified in the order permitting the amendment and setting the case for trial the following week, leave was not asked of Court for filing the Amended Demurrer and Answer until Monday, August 20, 1928, following the filing of the same on Saturday, August 18, 1928.

On August 20, 1928, before proceeding to trial, the defendant as a mere formality requested that the record show leave of court for filing the Amended Demurrer and Answer. Said application was denied by the Court, first, upon the ground that proof could properly be offered and received under its original answer of all of the defenses set forth in defendant's proposed amended answer, second, upon the ground that said amended answer was not served and filed as prescribed by law, and third, because the first of the separate defenses contained therein, setting up lack of notice in avoidance of the policy was sham and frivolous in that the complaint alleged and the answer admitted that the defendant, General Accident, Fire & Life Assurance Corporation, Ltd., through its attorneys,

Messrs, Sloan, Holton, McKesson & Scott, appeared for and represented George Ross, the defendant in cause No. 10580 in the Superior Court of Yavapai County, Arizona, throughout said suit and said defendant was, therefore, estopped to set up and allege lack of notice.

It is obvious by an inspection of the original Demurrer and Answer and the Amended Demurrer and Answer that the latter sets up several affirmative defenses not contained in the former and which under the law would necessarily have to be specially pleaded in order to entitle defendant tto introduce evidence thereunder. Furthermore the amended demurrer includes the additional ground that several causes of action are improperly united. The judgment recovered by Clark and his wife in the Superior Court of Yavapai County, Arizona, against Ross was a joint one. Admitting for the purpose of the argument that Ross might not now be heard to complain of this fact, nevertheless it becomes highly material in a determination of the liability of the defendant in this action, General Accident Life & Fire Insurance Corporation, Ltd.

Under the terms of the rider attached to the policy sued upon by plaintiffs the insurance company agreed to pay any final judgment recovered against its assured, George Ross, by reason of any loss or claim covered by the policy, *up to the limits expressed in the policy* direct to the plaintiff securing the judgment. The following provision respecting the limit of liability is expressed in the policy:

"STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000,-00) and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,-000.00)."

The pltintiffs' right to recover, if at all, is based upon the insurance policy and the rider attached thereto. As seen by the foregoing excerpt from the policy, it is clear that the contract limits the right of recovery for bodily injuries to any one person to $5,000.00. It is equally clear that the plaintiffs, in order to recover a sum greater than $5,000 must sue for damages for bodily injuries by reason of an accident covered by said policy sustained by two or more persons. Plaintiffs are claiming that they have a right of recovery of a total sum of $10,000 because of bodily injuries sustained by Etta Clark in the sum of $5,000, and bodily injuries sustained by L. A. Clark, her husband, in the sum of $5,000.00. It is only upon this basis that the judgment of the court below can be sustained.

In this connection it is interesting to note the finding of the Supreme Court of Arizona in its opinion above referred to. An exemplified copy of

said decision has been filed in this Court pursuant to the authority of the following cases:

Gulf etc. Ry. Co. v. Dennis,
32 S. Ct. 542,
224 U. S. 503;
Meccano, Ltd. v. John Wanamaker,
40 S. Ct. 463,
253 U. S. 136.

As regards compensation for bodily injuries alleged to have been suffered by Mr. and Mrs. Clark that Court found:

> "We conclude that if $1,000 actual damages be allowed to the husband and $6,000 to the wife on account of injuries sustained, they will be amply compensated."

In regard to injuries to Mr. L. A. Clark that Court found:

> "The husband, L. A. Clark, was but slightly injured. He was not prevented thereby from performing his usual work and received no professional services on account of his injuries."

The Supreme Court of Arizona ordered a remittitur of $5,000 which was filed by the Clark's, leaving a balance against Ross of $7,000 actual and $3,000 punitive damages. It would, of course, be an absurdity for anyone to claim that the defendant in this action, General Accident Fire & Life Assur-

ance Corporation, Ltd., would be liable for that portion of said judgment awarding punitive damages against Ross.

> "Inasmuch as the basis of an allowance of exemplary damages is the commission of an intentional wrong, they * * * can be awarded only as against one who has participated in the wrong."
> 17 C. J. 988,
> Cases cited under Note 32.

We quote further from the same work:

> "Exemplary damages are not generally recoverable against sureties upon bonds, even though the breach on the part of the principal was malicious or tortious."

Manifestly two separate and distinct causes of action are united in the complain herein, which fact was not covered by the demurrer filed under the circumstances above set out, a few days prior to the Amended Demurrer.

In Brookside-Pratt Mining Co. v. McAllister, 72 So. 18, we find the following language:

> "The action being joint, the plaintiffs were not entitled to recover damages which were purely personal to each and not joint as to both, such as physical or mental pain, anguish, or inconvenience of either the husband or the wife alone. Even if both suffered like damages in

this respect, such are necessarily separate and individual, and to each separately, and not to both jointly. Such separate and individual damages are not recoverable in a joint action like this.

Jefferson Fert. Co. v. Rich et al., 182 Ala. 633, 62 So. 40.

"Mr. Dicey, in his book on Parties, states the law and rules of practice correctly and succinctly as follows:

'1. Persons who have a separate interest and sustain separate damages must sue separately.

'2. Persons who have a separate interest, but sustain a joint damage, may sue either jointly or separately in respect thereof.

'3. Persons who have a joint interest must sue jointly for an injury to it.'

Dicey on Parties to Actions (2d. Ed.) 401.

"Several parties cannot sue jointly for injuries to their respective persons. The principle underlying the rule is that it is not the act which injures one or both, but the consequence of the act, in the way of damages, that determines whether plaintiffs should join or sever. One stroke or one word may injure two or more alike, in the person or in the feelings, yet their actions are separate and not joint. There can be no joint action in such cases because one cannot share the suffering or injury of the other. 1 Chit. p. 64. If there be an improper joinder in such cases, advantage may be taken thereof by appeal or writ of error, whether the matters appear in the pleading or not."

The Federal Courts have adopted the liberal rules prevailing in most of the State Courts regarding amendments of pleadings.

Jones v. Rowley, 73 Fed. 287;
Derk P. Yonkerman Co. v. C. H. Fuller's Ad-Agency, 135 Fed. 613;
Philadelphia & Reading Coal & Iron Co. v. Kever, 260 Fed. 534.
(Certiorari denied—Kever v. Philadelphia & Reading Coal & Iron Co., 250 U. S. 665, 40 S. Ct. 13, 63 L. Ed. 1197).

The Supreme Court of the State of Arizona in the case of Perrin v. Mallory Commission Co., 8 Ariz. 404, 76 P. 476, has held that a demurrer is an answer under the statutes of Arizona and that an answer, by said statute, may be amended before trial without leave, as a matter of right, and that the defendant had the right under the statutes at any time before trial to amend his pleading by setting up a new defense and the trial court erred in striking the amended answer from the files and refusing to consider it.

In the case of Timmons v. Wright, 22 Ariz. 135, 195 P. 100, the trial court, after ruling on the demurrers and motion to strike, refused to permit the defendant the right to amend and answer to the merits of the complaint. The Supreme Court, in determining the case, said:

"If appellants were right in their contention that only the law questions had been sub-

mitted, they should have been permitted to amend as a matter of right, while, if the court and appellees were correct in their understanding, the amendment should have been permitted under the circumstances in the exercise of a wise discretion.

"The fact alone that the appellants' answer contained only demurres and a motion to dismiss would not justify the conclusion that it was their intention not to answer to the merits in case the law questions raised should be decided against them, notwithstanding the requirements of paragraph 467, Civil Code of 1913, that all the pleas of a defendant shall be filed at the same time.' The provisions of paragraph 422, Civil Code of 1913, permitting an amendment any time before trial without leave of court and at any stage of the action with such leave, enables a defendant to test the law questions involved in his case before pleading to the merits. Perrin v. Mallory Com. Co., 8 Ariz. 404, 76 P. 476."

In the case of Senate S. M. Co. v. Hackberry etc. Co., 24 Ariz. 481, 211 P. 564, it was held that the trial court abused its discretion in refusing, under the circumstances, to permit the filing of an amended answer during the trial of the case; that the defendant was surprised by the turn of events and that it was evident he relied upon a trial on the merits and that of counsel made a mistake it would seem that their client should not be made to suffer thereby. The Arizona Supreme Court, citing Perrin v. Mallory Comm. Co., supra, said:

"A very good reason for the existence of this rule is that the plaintiff may take a nonsuit and commence another action, whereas the defendant, if denied the privilege of amending, might be without remedy. Our own statute relating to amendments is so liberal that it would be difficult to extend it by construction, and we are not at liberty to place upon it limitations which the legislature has not seen fit to prescribe."

"The general rule is well stated in 21 R. C. L. 572:

'It is a general rule that amendments to pleadings are favored and shall be liberally allowed in furtherance of justice. The exercise of the power to permit amendments rests in the sound discretion of the trial court; and, as a rule, this discretion will not be disturbed on appeal except in case of an evident abuse thereof, or unless the appellant shows affirmatively that he was prejudiced by the ruling. It is the usual practice of the courts to allow rather than to refuse amendment.'"

We maintain that the provisions of Chapter 14 Session Laws of Arizona, 1925, amending Sec. 422 Civil Code, 1913, and reading:

"All pleadings or proceedings may upon leave of the court be amended at any stage of the action upon such terms as the court may prescribe, or the same may be amended without such leave, not less than five days before trial, upon serving the adverse party with a copy of such amended pleadings or proceedings."

cannot with any sense of justice or right be invoked as sustaining the refusal to permit the defendant to file such amended pleading. As heretofore stated the trial Court on Monday, August 13, 1928, entered its order (Transcript Record, p. 148) setting aside the judgment theretofore prematurely rendered ,allowed defendant to file answer, and set the case for trial on the following Monday, August 20th. Under the amendment to the State statute just cited this would have required defendant to have filed its Amended Answer not later than Wednesday, August 15th, or two days after the entry of the order permitting it to answer to the merits, which we think any Court would agree to be an unreasonably short time for the preparation and filing of a pleading of the sort under consideration.

A third ground set up for the refusal of permission to file the Amended Demurrer and Answer was that one of the defenses plead therein was sham and frivolous. Conceding for the purpose of the argument alone that this was true, there still remained therein a number of good and valid defenses to the action, the refusal to permit the filing of which, we contend was error. However, we most strenuously deny the charge that the defense of lack of notice was sham or frivolous and that the defendant was estopped by virtue of its defense of the action against its assured, Ross, in the Superior Court, from asserting the defense in this action.

In that regard the rider attached to the Ross policy and under which the appellees are claiming, reads:

> "PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona."

It requires no citation of authority to sustain the proposition that where a policy of insurance requires as a prerequiste to the assertion of a right thereunder the giving of notice to the company of a loss or claim arising under the policy, no action can be maintained by the assured or party seeking to avail himself of the benefits of the policy until such notice has been given. This general principle is qualified by the fact that such notice may be waived by the insurer either in express terms or by implication, viz., by conduct inconsistent with its right to require such notice. One of the grounds upon which the Court below based its refusal to permit appellant to file its Amended Demurrer and Answer was the fact that it was estopped to plead want of notice because it had participated in the defense of the action against Ross in the Superior Court of Yavapai County. We do not believe it to

be the law that by performing its contractural duty under the policy and assuming the defense against a claim under a rider like that involved here, the insurance company is estopped to later set up failure on the part of the person making such claim to give the notice required by the rider.

In Oakland Motor Car Co. v. American Fidelity Co., 155 N. W. 729, the Supreme Court of Michigan held that where an insurer undertook to defend an action covered by an automobile policy on the representations of the insured that it had not received notice of the occurrence until the filing of suit, such act was not a waiver of the insurer's right, upon discovering the fact that it had received notice months previously, to rely on a provision of the policy requiring the insured in case of an accident to give immediate notice. The Court in that case in discussing the obligation to give notice said:

> "Contracts of insurance against the consequences of the insured's negligence are, as a rule, limited, and but partial. Conditions for notice of the event insured against similar to those under consideration are common in policies for most kinds of insurance. They are nothing new or misleading. Such stipulations, when contained in the policy, are recognized as valid, and must be complied with before recovery can be had, if within the power of the insured. Plaintiff's right to indemnity flows from this policy, constituting the written agreement between the parties which they voluntarily entered into and of which these

conditions form a part. Failure by plaintiff to observe the condition precedent of this executory contract was failure to perform the contract on its part. It first breached the contract, and by such nonperformance it released the other contracting party. In order to maintain this action, it was bound to give notice of both the accident and claim for damages as and when by the terms of the contract it agreed to do so.

"For the foregoing reasons, we are constrained to conclude that, as a matter of law, under the undisputed evidence, plaintiff failed to give timely notice of the accident and claim in compliance with its agreement as expressed in the conditions of this policy under which recovery is sought, and a verdict should have been directed for defendant."

"The judgment is therefore reversed, without a new trial."

In all cases we have been able to find upon the subject the question under consideration was the effect of failure on the part of the *assured* named in the policy to give notice of a suit or claim being made thereunder. In the case at bar persons not parties to the contract but for whose benefit it, by virtue of the rider required by the Corporation Commission of Arizona, was entered into, are claiming under the policy. To recover such parties must bring themselves squarely within the contract made for their benefit and show that the notice therein specifically required was given. We submit that the appellant in participating in the de-

fense of the action against its assured, in the Superior Court in no way waived its right to insist upon fulfilment of this condition of the rider attached to the policy, or is estopped in this action to stand upon its contract as entered into.

We submit that in the exercise of a just discretion, in view of the circumstances of the case and the undue haste required of defendant at every stage of the proceedings, that the filing of the Amended Demurrer and Answer should have been allowed and that the Court's refusal to permit the same constituted error prejudicial to the rights of the defendant.

THIRD ASSIGNMENT OF ERROR.

Appellant charges error on the part of the trial court in receiving in evidence Plaintiff's Exhibit No. 1, said exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of the State of Arizona, in the appeal of cause No. 10580, L. A. Clark and Ettta Clark vs. George Ross, from the Superior Court of the County of Yavapai, State of Arizona, over the objection of defendant.

The bill of exceptions certified by the trial court to this Court, in referring to the reception of this document in evidence, states:

> "That said instrument or document was not nor did it purport to be a certified copy or copies of the records of the Supreme Court of

the State of Arizona, or of the Superior Court of the County of Yavapai, State of Arizona, or of any other court. That said instrument or document was not nor did it purport to be the original of any judgment, judgment-roll or any other record of the Superior Court of the County of Yavapai, State of Arizona, or of any other court. That said instrument or document did not contain the original nor any copy of the judgment-roll in cause No. 10580 in the Superior Court of the County of Yavapai, State of Arizona, certified to under the hand and seal of the lawful possessor of such records.

"That counsel for plaintiffs stated that said document so offered was offered for the purpose of proving the pleadings, the judgment and verdict and other matters essential to be proven in this case in the case of L. A. Clark and Etta Clark vs. George Ross, Cause No. 10580, Superior Court of Yavapai County, Arizona, and referred to in plaintiff's complaint. That attached hereto is a true copy of the pleadings, instructions, verdict and judgment in said Cause No. 10580 in said Superior Court, as shown by said purported Abstract of Record, received in evidence herein as Plaintiff's Exhibt 1.

"That counsel for defendant objected to the introduction in evidence of said instrument or document upon the ground that it was not the best evidence and that said offer did not conform to the law with reference to the manner and mode for proving official documents and court records within the State of Arizona. That the Court did thereupon overrule defend-

ant's objection to the admission of said instrument or document in evidence and did admit the same in evidence as plaintiff's Exhibit No. 1, for the reason, as stated by the Court, that in view of the allegations in the answer admitting certatin allegations contained in Paragraph VI of the complaint herein, said Exhibit No. 1 was admissible, which said paragraphs of the complaint and answer are as follows, to-wit: Paragraph VI of the complaint reads as follows:

'VI.

'That plaintiffs thereafter instituted an action in the Superior Court of Yavapai County, Arizona, being Cause No. 10580 therein, against said George Ross to recover damages for and on account of said injuries suffered by plaintiffs as aforesaid in which said action appearance was entered in the name and on behalf of said George Ross by counsel employed by defendant, to-wit: Messrs. Sloan, Holton, McKesson and Scott, of Phoenix, Arizona, and said counsel, together with other counsel employed by said George Ross, appeared for and represented said George Ross throughout said suit; that said cause was tried by said Court, with a jury, and on the 9th day of November, 1927, plaintiffs, jointly, recovered a judgment against said George Ross for and on account of said bodily injuries suffered by plaintiffs, and each of them, as aforesaid, in the sum of Fifteen Thousand Dollars ($15,000.00),

together with costs assessed at the sum of $196.35.'

"Paragraph VI of the answer reads as follows:

'VI.

'Admits the allegations contained in Paragraph VI thereof.' "

It will be noted that said document was offered by plaintiffs for the express purpose of "proving the pleadings, the judgment and verdict and other matters essential to be proven in this case in the case of L. A. Clark and Etta Clark vs. George Ross, Cause No. 10580, Superior Court of Yavapai County, Arizona, and referred to in plaintiff's complaint."

Rule 43 of the Rules of Practice of the United States District Court for the District of Arizona, provides as follows:

"RULE 43
Admissibility of Evidence.

"Except as otherwise provided by act of Congress, the State laws in relation to the admissibility of evidence shall be the rule of decision in this Court in actions at law."

Section 1739, Revised Statutes of Arizona, 1913, Civil Code, reads as follows:

"1739. Copies of the records of all public officers and courts of this state, *certified to*

> *under the hand and seal (if there be one) of lawful possessor of such records,* shall be admitted as evidence in all cases where the records themselves would be admissible."

Manifestly the purported abstract of record received as Plaintiff's Exhibit 1 was not lawful evidence of the facts appearing therein. The admission by the defendant in Paragraph VI of its answer that the Clarks had recovered a judgment against Ross in said cause 10580 in said Superior Court was no admission of its terms or that the purported judgment and pleadings set out in the uncertified copy of said Abstract of Record were in fact copies of the original documents on appeal to the Supreme Court of Arizona.

We think it will suffice in this connection to cite the text found in 34 Corpus Juris at page 1103, as follows:

> "In an action on a domestic judgment the existence and terms of the judgment should be proved by the production of a transcript or exemplification of it, *attested in accordance with local law.*

The cases cited under note 32 fully bear out the text.

The reception of said document in evidence should have been refused on the further ground that the same was not authenticated as provided by the Act of Congress pertaining to proof of judicial proceed-

ings and records of any state or territory, or of any country subject to the jrisdiction of the United States.

Rev. Stat. U. S. sec. 905;
U. S. Comp. Stat. 1918, sec. 1519;
3 Fed. Stat. Ann. (2d. Ed.) 212.
U. S. Code Annotated, Title 28, sec. 687.

Said act reads as follows:

"AUTHENTICATION OF LEGISLATIVE ACTS; PROOF OF JUDICIAL PROCEEDINGS OF STATE. The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Manifestly, before the document introduced herein by plaintiffs would be entitled to the full

faith and credit contemplated by the Act it must be authenticated in the manner therein prescribed. We submit that defendant's objections to the introduction of said document in evidence should have been sustained and that its motion to strike the same, assigned as error in its Seventh Assignment, argued herewith, should have been granted.

FOURTH ASSIGNMENT OF ERROR

This Assignment is directed at the admission in evidence as Plaintiffs' Exhibit No. 2 over the objection of the defendant of the policy of insurance issued by defendant herein to George Ross (Transcript Record, page 66). Objection was made to the introduction of this document in evidence upon the ground that no proper foundation had been laid therefor in that it had not been shown that the automobile described in said policy was the automobile referred to in plaintiff's complaint. It is to be remembered in this connection that Ross, the defendant in the action in the Superior Court, was the owner and operator of a fleet of taxicabs and for-hire cars in Prescott, Arizona, and vicinity; that said policy was not a blanket one covering all cars owned by said defendant, Ross, but covered one particular automobile, viz:

> Paige 5 Passenger Sedan, 1926 Model, 6 cylinders, Motor No. 417333, Serial No. 409495.

The general rule in such cases is stated in 38 Cyc. 1350, as follows:

> "According to the great weight of authority, in order to entitle a party to introduce evidence as a matter of right, it must be admissible at the time it is offered. If proof of other facts is necessary to render it admissible the court may properly reject it, or require proof of such facts before admitting it."

The only exception to the general rule regarding the laying of the proper foundation for the reception of such evidence by necessary preliminary proof is where such proof is later supplied and the error cured. No preliminary proof of identity of the car described in the policy and that in the complaint was offered at the time said policy was received in evidence in this case, nor was such proof later supplied.

In the case of Emery Consol. Mining Co. v. Erickson, 208 Pac. 935, it was held in an action in claim and delivery to recover property alleged unlawfully in possession of defendant, a judgment docket of a justice of the peace showing action by plaintiff against vendor of defendant for purchase price of similar property was inadmissible, where it was not established that the property mentioned in the complaint for which action in the justice court was brought was identical with that described in the action in claim and delivery.

See also Leal v. Moglia, 192 S. W. 1121, holding that in trespass to try title, a sheriff's deed whose description was insufficient without the aid of extrinsic evidence should have been excluded, where such extrinsic evidence was not offered.

Similarly in the case of Sheehan v. Minneapolis & St. L. R. Co., 193 N. W. 597, an action for damage to a shipment of horses, that a letter in which plaintiffs claimed damages for injuries to a certain shipment of horses was not admissible in the absence of a showing that any of the horses which the letter claimed to have been injured were included among the horses for injuries to which the action was brought.

It is hardly necessary to state that this lack of preliminary proof cannot be aided by the inference that because the automobile designated in the complaint and that described in the policy both bore the name "Paige" that they were one and the same. Mere evidence of similarity of names is insufficient in such a case to supply the necessary preliminary proof.

Gibson v. Mason, 121 S. E. 584;
Stiegler v. Eureka Life Ins. Co., 127 A. 397.

In concluding our argument of this assignment we desire to call attentaion to the decision of this Court in United Verde Copper Co. v. Jordan, 14 Fed. (2d) 299; 14 Fed. (2d) 304; affirming the ruling of the District Court of Arizona in excluding

such evidence until the proper preliminary foundation therefor had been laid. (Opinion of Court below—9 Fed. (2d) 144).

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

Appellant's fifth and sixth assignments of error charge error in the reception in evidence as Plaintiffs' Exhibits 3 and 4, respectively, of a letter dated July 7th, 1928, from the law firm of Anderson & Gale, attorneys for the Clarks (Transcript Record, p. 129) to one B. F. Hunter, and a reply thereto (Transcript Record, p. 131). For the sake of brevity, as the same argument pertains to each of these letters, they will be considered together.

Said letters were offered by plaintiffs for the purpose of showing compliance with the provision in the rider attached to the policy relating to notice to the General Accident, Fire & Life Assurance Corporation, Limited, of an injury and claim under the policy. Objection was made by defendant to each of said letters upon the ground that said letters did not show or purport to show that B. F. Hunter was an accredited agent, or any agent of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon herein; that said letters did not constitute notice to defendant company as provided by the terms of said policy; that no evidence whatever had been introduced by plaintiffs that said B. F. Hunter was in truth and in fact an agent of the defendant corporation authorized to represent

or bind the defendant corporation, and that said letters and each of them were wholly irrelevant and immaterial and not competent evidence of any fact material to the issues of this case. It will be noted that the letter of Anderson & Gale, dated July 7th, 1927, was not addressed to the defendant in this action, the General Accident Fire & Life Assurance Corporation, Limited, but to a "Mr. B. F. Hunter, c/o Standard Accident Ins. Co., Phoenix, Arizona." The Standard Accident Insurance Company is a corporation with its principal place of business at Detroit, Michigan, and has not nor has it ever had any connection with the defendant in this action; Its agent was The Standard Agency, Inc., at Phoenix, Arizona. On July 11, 1927, Mr. B.F.Hunter replied to the aforesaid letter, on the letterhead of The Standard Agency, Inc., in which letter he neither mentions the defendant in this action nor purports to act as its representative in any capacity whatever. Manifestly no showing whatever was made by plaintiffs that B. F. Hunter was an accredited agent, or any agent of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon herein, or that he was authorized to represent or bind the defendant corporation in any manner whatever. A feeble and wholly ineffectual attempt was made to establish this fact by placing Mr. Stock, of counsel for plaintiff. on the stand, who testified in that regard as follows:

"Mr. Anderson: Q. Do you know who Mr. Hunter represented?

Mr. Holton: Object to that question.

The Court: Objection overruled.

A. I am not acquainted with him personally, but he signs the letter on behalf of the Standard Agency.

Mr. Holton: Object to that. The letter speaks for itself.

Mr. Anderson: Q. Did he come to our office representing any particular insurance company?

A. I never talked to him personally.

Mr. Holton: He has already stated he is not acquainted with him.

Mr. Anderson: Q. Do you know that he came there?

A. I think he came there at one time, yes.

Q. Do you know who he represented?

A. He represented the Ross insurer.

Mr. Anderson: That is all.

CROSS-EXAMINATION
By Mr. Holton.

Q. Mr. Stack, you stated at one time that you were not acquainted with this gentleman.

A. I am not personally acquainted with him, no.

Q. You did not see him when he was at the office—he did not interview you?

A. I never talked to him personally, so far as I now recall."

We submit that no showing whatever was made that B. F. Hunter was an accredited agent or rep-

resentative, or any agent or representative of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon, or that said B. F. Hunter was an agent of the defendant corporation authorized to represent or bind the defendant corporation. Therefore, we contend that said letters were wholly irrelevant and immaterial and not competent evidence of any fact material to the issues of this case and that the trial Court erred in admitting them in evidence.

SEVENTH ASSIGNMENT OF ERROR

Error is charged by appellant in its seventh assignment of error upon the refusal of the trial court to grant defendant's motion made at the close of plaintiff's case to strike Plaintiffs' Exhibit No. 1, said exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of Arizona in the appeal of cause No. 10580 from the Superior Court of the County of Yavapai, State of Arizona. The law bearing upon the reception of this document in evidence was fully set forth in our argument under the third Assignment of Error and reference is hereby made for the purpose of brevity to our argument under that assignment.

EIGHTH ASSIGNMENT OF ERROR

For the purpose of brevity, and as the same argument is applicable to each assignment, Assignment number eight will be aruged in connection with the Thirteenth Assignment of Error.

NINTH ASSIGNMENT OF ERROR

For the reason stated under the Eighth Assignment of Error we will argue our Ninth Assignment of Eror in connection with the Fourteenth Assignment of Error.

TENTH ASSIGNMENT OF ERROR

Likewise the Tenth Assignment of Error will be argued in connection with the Fifteenth Assignment of Error.

ASSIGNMENTS ELEVEN AND TWELVE

Error is charged in these assignments upon the refusal of the trial court to permit counsel for defendant to propound a question to the witness as to a statement made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in cause No. 10580 in the Superior Court of Yavapai County, Arizona, to the effect that no claim was being made by the plaintiffs in that case for any injuries that may have been sustained by the plaintiff, L. A. Clark. It is to be noted that the judgment in that cause awarded damages to the plaintiffs jointly in the sum of $15,000; that there were no separate findings as to personal injuries, if any, received by the respective plaintiffs. The fact that said judgment (Transcript Record, p. 117) read:

> "IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs, L. A. Clark and Etta Clark, his wife, do have and recover of and from defendant, George Ross, the sum of Fif-

> teen Thousand Dollars ($15,000.00), together with interest", etc.

in nowise implies that personal injuries were received by both the husband and wife, parties plaintiff.

It is provided by the Revised Statutes of Arizona, 1913, Civil Code, sec. 403, as follows:

> "403. When a married woman is a party her husband shall be joined with her except:
> (1.) When the action concerns her separate property she may sue or be sued alone.
> (2.) When the action is between herself and her husband, she may sue or be sued alone."

Under the foregoing statute the husband is an indispensable party plaintiff to an action for personal injuries brought by the wife. By no possible stretch of the imagination can it be said that a judgment awarding damages for personal injuries in an action jointly brought by them, which judgment in no manner sets out the amount of damages to each, or for which party plaintiff they were awarded, implies equal or any damages and injuries to both.

While Ross, the defendant in that action might not now be heard to complain that such damages were not seggregated, the plaintiffs are not proceeding against Ross but against another whose liability is limited strictly to damages for bodily injuries

sustained arising under its contract, and to the amounts therein set forth.

The limitation of liability stated in the policy is as follows:

> "STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars."

Had the plaintiffs in said action in the Superior Court only been claiming damages for the injuries to one person, namely, Mrs. L. A. Clark, and their counsel so declared in open court, it is obvious that whatever judgment was therein recovered would have been enforcible against the Ross insurer to the limit of liability for damages for personal injuries to one person expressed in the policy, or $5,000.00.

That an attorney has the power to bind his client by his statements or admissions in court is well settled.

Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261;
Harniska v. Dolph, 133 Fed. 158.

EIGHTH AND THIRTEENTH ASSIGNMENTS OF ERROR

These Assignments charge error in the overruling of defendant's demurrer to the evidence at the close of plaintiffs' case and at the close of the entire case respectively. As the argument under Assignments Fourteen and Fifteen is applicable here, for the sake of brevity, said assignments will be argued together.

The contention of Clark and his wife being that said judgment was for personal injuries to each, and the verdict and judgment being silent upon this subject, with the exception that the word "plaintiffs" was used therein, which was only the proper procedure under Sec. 403 Rev. Stats. Arizona, 1913, Civil Code, above cited, the defendant in this case had the right to show the true facts. A waiver by Mr. Anderson, counsel for plaintiffs, by his statement in the argument to the jury, that he was claiming no damages on account of personal injuries to Mr. Clark in that action, was proper to be shown. The two witnesses to whom the alleged objectionable question was propounded, were each attorneys present throughout the entire trial of Clark vs. Ross, No. 10580, in the Superior Court of Yavapai County, and heard the argument in which the statement of counsel for plaintiffs waiving any claim for injuries to Mr. Clark was alleged to have been made.

We submit that the trial court by sustaining the objection to these questions and refusing the offer of proof above mentioned deprived defendant of a substantial right to its prejudice.

NINTH AND FOURTEENTH ASSIGNMENTS OF ERROR

Our Ninth Assignment of Error is directed at the order overruling the defendant's demurrer made at the close of plaintiff's case that it appeared from the evidence at said time that there were two causes of action improperly united in the complaint, viz.,

that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. The Fourteenth Assignment of Error charges error upon the overruling of the same demurrer which was renewed at the close of the entire case.

Under Statement 8 of the policy, above set forth, the liability of the insurer for loss from an accident resulting in bodily injuries to or in the death of one person is limited to $5,000, and, subject to the same limit for each person, its total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to $10,000.00.

The argument under our Second Assignment, in which we cited Brookside-Pratt Mining Co. v. McAlister, 72 So. 18, is applicable here. Any right of action each may have for personal injuries is separate and distinct from that of the other. While, of course, the husband, under Sec. 403, Civil Code, Arizona, supra, would have to join as a formal party plaintiff in the wife's action, nevertheless for personal injuries alleged to have been received by him, he would have to sue separately. We again quote from the McAlister case, supra:

> "The action being joint, the plaintiffs were not entitled to recover damages which were purely personal to each and not joint as to both, such as physical or mental pain, anguish,

or inconvenience of either the husband or the wife alone. Even if both suffered like damages in this respect, such are necessarily separate and individual, and go to each separately, and not to both jointly. Such separate and individual damages are not recoverable in a joint action like this."

TENTH AND FIFTEENTH ASSIGNMENTS OF ERROR

Appellant's Tenth and Fifteenth Assignments of Error charge that the court erred in denying defendant's motion made at the close of plaintiffs' case and at the close of the entire case, respectively, for judgment in favor of the defendant and against the plaintiffs for the reason that the evidence at said times failed to show: (1) What, if any, amount each of the plaintiffs was entitled to recover; (2) That the injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action; (3) That two causes of action were improperly united in that the policy of insurance introduced in evidence did not give the right to plaintiffs to recover jointly, but limited each to the amount of his or her injury, not to exceed $5,000 each, and there was no showing as to what damages were sustained by each of said plaintiffs; (4) That plaintiffs had wholly failed to establish by the evidence the facts necessary to entitle them to recover under the terms of the policy upon which they were suing.

It is apparent that before there can be a recovery by plaintiffs or either of them against the defendant in this action there must be competent proof of *bodily injuries* suffered by one or both, as distinguished from damage to legal rights as loss of consortium and the like.

In this connection we quote the following from Williams v. Nelson, 117 N. E. 189:

> "The husband of the female plaintiff recovered judgment against the insured for the loss or damages sustained by him because of the physical injury to his wife. The question is whether this judgment is for the 'bodily injury * * * of any person.' Bodily injury imports harm arising from corporeal contact. In this connection 'bodily' refers to an organism of flesh and blood. It is not satisfied by anything short of physical, and is confined to that kind of injury. It does not include damage to the financial resources of the husband arising from a bodily injury to the wife. Hey v. Prime, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570 and cases cited; Keating v. Boston Elevated Ry., 209 Mass. 278, 282, 95 N. E. 840. Personal injury in other connections has been held to be of more comprehensive significance. Mulvey v. Boston, 197 Mass. 178, 180, 83 N. E. 402; 14 Ann. Cas. 349; Madden's Case, 222 Mass. 487, 492, 111 N. E. 379, L. R. A. 1916D. 1000. But 'bodily injury * * * of any person' cannot reasonably be held to include the kind of loss suffered by the husband.
>
> It follows from what has been said that in

the suit by the wife the entry must be decree affirmed with costs, and in that by the husband the decree must be reversed, and in accordance with St. 1913, c. 716, sec. 2, a new decree entered dismissing his bill with costs.

So ordered."

Also the case of Klein v. The Employers' Liability Assurance Corporation, 9 Ohio Appellate Reports 241. For the convenience of the Court and as the opinion is brief, we have set it out in full:

"BY THE COURT. The policy upon which this action is based indemnifies plaintiffs 'against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any person or persons by means of the maintenance or use' of a certain automobile, within certain limits of time and place, subject to certain conditions among which is:

> 'Condition A: The Corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability on account of any one accident resulting in injuries to more than one person, including death, is limited to Ten Thousand Dollars ($10,000.00).'

"By reason of bodily injuries to Jennie Goldstein damages have been recovered and paid

to her and also to her husband, Daniel Goldstein. It is conceded by defendant that it is bound to indemnify plaintiffs for both these recoveries subject to the limitation expressed in the policy. The only question to be determined is whether the limit of liability is five thousand or ten thousand dollars.

"We hold that this limit is five thousand dollars.

"This is clearly fixed by the first clause of Condition A: 'The Corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to Five Thousand Dollars.' This clause by the use of the word 'such' injuries refers only to bodily injuries, and limits the indemnity, no matter how many may recover because of such injury, since, as in this case, more than one person may claim and secure damages for bodily injuries to the one person.

"The latter part of Condition A, which increases the limit where more than one person is injured as a result of any one accident, is distinctly stated to be 'subject to the same limit for each person,' that is, to the five thousand dollar limit for each person receiving bodily injuries.

"We are in accord with the opinion of Judge May in the trial court, as found in 19 N. P. N. S. 426.

"Judgment affirmed."

To the same effect see Ravenswood Hospital v. Maryland Casualty Co., 117 N. E. 485.

It was, therefore, incumbent upon the plaintiffs, in order to bring themselves within the terms of this policy, to have introduced evidence of bodily injuries to each, and to have a definite and conclusive finding in the judgment as to the amount of damages sustained by each for bodily injuries. This they failed to do. The burden of proof was upon the plaintiffs to bring themselves within the terms of the contract and to show by a preponderance of the evidence that they and each of them suffered bodily injuries for which a final judgment was rendered. We confidently assert that there is no such proof. The only evidence in the case touching upon that question is the judgment, and it is silent as to the amount of injuries, if any, sustained by either Mr. or Mrs. Clark. We have heretofore argued the questions that the injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action, and that two causes of action were improperly united. Also that there was no competent proof before the trial court of the terms of the judgment sued upon in this action.

So far as the record introduced by the plaintiffs is concerned, the judgment might have been rendered upon any one of the three different theories or causes of action embodied in the complaint. (Complaint in Cause No. 10580 in the Superior Court of Yavapai County, Arizona, will be found at page 95, Transcript Record.)

In Lewis v. Ocean Nav. etc. Co., 125 N. Y. 341, 26 N. E. 301, it was held:

> "Where a judgment may have proceeded upon either or any of two or more different and distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open for a new contention."

And in the case of Littlefield v. Huntress, 106 Mass. 121, it was held that where, in a suit against the maker of a promissory note, the defendant interposes two defenses, one of which is to the effect that the note was originally void and the other that, if originally valid, the note was subsequently discharged by agreement between the parties, and a judgment is rendered for the defendant, wherein it does not appear on what ground the decision was made, the question whether the note was originally void is not res adjudicata.

To the same effect are:

Matson v. Poncin,
152 Iowa 569;
132 N.W. 970,
38 L.R.A. (N.S.) 1020;
Leonard v. Schall,
157 N. W. 723,
4 A.L.R. 1166.
Berkhoefer v. Burkhoefer,
67 S. W. 674.

The Supreme Court of the United States in no uncertain language has decided the question involved here. In Russell v. Place, 94 U. S. 606, 24 L. Ed. 214, Mr. Justice Field, speaking for the court, said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. * * * According to Coke, an estoppel must 'be certain to every intent'; and if, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

The foregoing case was cited with approval in DeSollar v. Hanscome, 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956, wherein it was said:

> "There is in this case no extrinsic evidence tending to show upon what the verdict of the jury was based. We have simply the record of the former judgment, including therein the testimony and charge of the court, from which to determine that fact; and, in the light of the charge, it is obviously a matter of doubt whether the jury found that the agreement made by the agent was ratified by the principal, or that no damage had in fact been sustained by placing the papers upon record. We are not now concerned with the inquiry whether the instructions of the court were correct or not. We look to them simply to see what questions were submitted to the jury, and if they left it open to the jury to find for the defendant upon either of the two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other. The principal contention, therefore, of the plaintiff fails."

We submit that the judgment attempted to be introduced in evidence in this case by the plaintiffs, standing alone does not show upon its face that either of the plaintiffs were awarded damages for bodily injuries. It wholly fails to show upon which of the several theories set up in the complaint the jury rendered its verdict which was the basis of the

judgment. Not only are juries precluded from speculating as to matters of fact, but courts likewise are so precluded. If the plaintiffs in this action desired to avail themselves of the benefits accruing to them under the contract with the assured, Ross, it was their duty to bring themselves strictly within its terms.

The plaintiffs could by special interrogatories or by separate verdicts have had adjudicated and determined the amount due to each of them from Ross for bodily injuries sustained. Without such special findings or special verdicts it is a matter of pure conjecture and speculation as to what the jury would find and as to what the judgment is for. We submit that under all the authorities plaintiffs are not entitled to a judgment in this action upon such evidence or lack of evidence.

Furthermore, in order that the judgment in the former action may operate as a bar, the issues in the second action must have been necessary and material issues in the first action and determined therein, and where this was not the case, they are open to be litigated in the later action.

Cromwell v. County of Sac,
94 U. S. 351,
24 L. Ed. 195;
Davis v. Brown,
94 U. S. 423,
24 L. Ed. 204;
Virginia-Carolina Chemical Co. v. Kirven,
215 U. S. 252,

30 S. Ct. 78;
Radford v. Myers,
34 S. Ct. 249.
231 U. S. 725.

The case of American Paper Products Co. v. Aetna Life Ins. Co., 223 S. W. 820, is, we feel, also squarely in point here. There it was held that a judgment in an action against an employer by an employee was inadmissible in an action by the employer against a casualty company for indemnity, where there were four issues involved in the case and the court made a general finding in favor of the plaintiff upon the issues joined, since it would be mere conjecture as to what issue or issues were determined.

We submit that the motion of the defendant for judgment in its favor at the close of the plaintiffs' case, which motion was renewed at the close of the entire case, should have been granted for the reason that there is no evidence in this case upon which a judgment could properly be predicated. In rendering its judgment in this case the Court below must of necessity have been required to guess or conjecture as to what the jury had in mind in the Ross case when it rendered its verdict. As neither the verdict nor the judgment contain any language from which a court can determine whether the judgment was based upon bodily injuries sustained by Clark, his wife, or either of them, or whether any part of said judgment is based upon bodily injuries, no recovery can be sustained. In that

regard we say that the plaintiffs wholly failed to carry the burden of proof imposed by law upon them.

In conclusion we respectfully submit that in addition to the fact, as we contend, that the defendant through the errors to which we have called attention, was not afforded a fair trial and that on such ground the cause should be reversed, the whole structure of plaintiffs' action has fallen by reason of the fact that the judgment upon which plaintiffs base their action is no longer in existence. We have caused to be filed with the Clerk of this Court an exemplified and authenticated copy of the opinion of the Supreme Court of Arizona and under the authorities which we have heretofore cited we believe it is not only within the power of this Court, but that it is the duty of this Court to consider the situation as it now exists, the Supreme Court of the State of Arizona having rendered its final decision in cause No. 2752, Ross v. Clark.

In that regard we not only rely upon the cases of Meccano, Ltd. v. John Wanamaker, 40 S. Ct. 463, 253 U. S. 136, and Gulf, Colorado & Santa Fe Ry. Co. v. Dennis, 32 S. Ct. 542, 224 U. S. 503, but upon the following additional authorities which hold that matters arising in a cause after an appeal has been granted may be presented to the appellate court and by it considered in disposing of the case:

Richardson v. McChesney,
218 U. S. 487,
31 S. Ct. 43,
54 L. Ed. 1121;
Buck's Stove & Range Co. v. American Fed. Labor,
219 U. S. 581,
31 S. Ct. 472,
55 L. Ed. 345;
Gompers v. Buck's Stove & Range Co.,
221 U. S. 418,
31 S. Ct. 492,
55 L. Ed. 797,
34 L. R. A. (N. S.) 874;
Phelps v. Cape Girardeau Water Works etc. Co.,
147 S. W. 130;
Cape Girardeau & Thebes Bridge Term. R. Co., v. Southern Illinois etc. Bridge Co.,
114 S. W. 1084;
Haggerty v. Morrision,
59 Mo. 324;
Dulaney v. Buffum,
73 S. W. 125.

Without in any manner whatever receding from our position that the plaintiffs in the court below failed to make out or establish any case whatever entitling them to judgment and that the cause should be reversed, but expressly relying upon such proposition, we nevertheless say that in the event this Court should find that the plaintiffs did make out a case which would entitle them to recover, such recovery must be circumscribed within and conform

to the decision of the Supreme Court of Arizona in Ross v. Clark as it affects the judgment upon which this suit was brought.

It is to be borne in mind that the plaintiffs' right of recovery is predicated upon the policy of insurance issued by the defendant corporation to George Ross wherein the liability of the company is limited to loss resulting in *bodily injury* to any one person to $5,000 and not to exceed $10,000 for any one accident. As to the plaintiff Mr. L. A. Clark and his right of recovery the opinion of the Arizona Supreme Court, after reviewing the evidence as to his injuries, states:

> "The husband's injuries were very slight and ephemeral. He was entitled to some damages but only enough to compensate him for his injuries. * * * He lost no time from his usual work. He had no treatment from any doctor. There is nothing of record indicating that his injuries were permanent. What part of the lump sum the jury may have figured was to compensate the husband and what part to compensate the wife cannot be known."

And again in finally deciding the question the Court said:

> "We conclude that if $1,000 actual damages be allowed to the husband and $6,000 to the wife on account of injuries sustained, they will be amply compensated."

Assuming then, that the $1,000 awarded to L. A. Clark by such opinion was for bodily injuries, which is not at all clear from the opinion, the most that the plaintiffs in this action could recover under the policy of insurance would be $1,000 for bodily injuries to L. A. Clark and $5,000 for bodily injuries to Etta Clark, his wife. It is to be borne in mind, however, that the opinion of the Supreme Court of the State of Arizona, while it cuts down and limits the amount of the recovery for bodily injuries to L. A. Clark and to Etta Clark, his wife, does not in any way establish the right of the plaintiffs to recover in *this* action.

We respectfully urge in that regard that the plaintiffs wholly failed to prove by competent evidence the facts essential to a recovery against the defendant corporation in this case, and that the cause should by reason of such lack of proof be reversed and remanded with instructions to dismiss the complaint.

Respectfully submitted,

SLOAN, HOLTON, McKESSON & SCOTT,
Attorneys for Appellant.

No. 5688

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., a Corporation,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, his wife,

Appellees.

APPELLEES' BRIEF

LEROY ANDERSON
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APPELLEES' BRIEF

In amplification of appellant's statement of the case, appellees wish to make it clear that the judgment of the Superior Court of Yavapai County, Arizona, herein sued on, represented bodily injuries sustained by both appellees, which judgment has, since the trial of this cause been affirmed by the Supreme Court of Arizona.

FIRST ASSIGNMENT

Appellant's first assignment charges error in the overruling of its plea in abatement. The special endorsement required by the rules of the Corporation Commission bound the defendant insurance company to pay, up to the limits of the policy, any person securing a *final judgment* against the insurer by reason of bodily injuries suffered through the operation and use of the automobile covered. This is a form of inurement clause substantially similiar to that required by the laws of many states regulating common carriers by automobile. The question raised for consideration by the plea in abatement was whether the judgment rendered in the State Court, and which formed in part the basis of this action, was, in view of the pendency of an appeal therefrom, a final judgment within the meaning of the inurement clause. The plea in abatement, and evidence submitted in support thereof, failed to show that any supersedeas bond had been filed, or that the State Court had stayed execution. The practice in Arizona requires a supersedeas bond in appeals from personal judgments to suspend execution pending appeal. Par. 1241 R. S. A. 1913.

The test in determing whether a judgment is final is whether it terminates the litigation between the parties on the merits and leaves anything to be done but to enforce it by execution. Words and Phrases on "Final Judgment", Vol 2, Second Edition, Doudell v. Shoo, 114 P. 579, Elliott v. Mayfield, 3 Ala. 223,

Crockett v. Crockett, 106 N. W. 944, State ex rel Potter v. Riley, 118 S. W. 647, State ex rel Smith v. Superior Court, 128 P. 648.

In 23 Cyc. 1503, a part of the chapter devoted to "Actions on Judgments," the general definition of a final judgment is given as follows:

> "To be available as a cause of action the judgment must be a definitive and personal judgment for the payment of money, final in its character and not merely interlocutory, remaining unsatisfied, and capable of immediate enforcement. The pendency of an appeal, writ of error, or petition for review will not deprive plaintiff of his right to sue on the judgment unless there has been a stay of proceedings. A judgment which is void will not sustain an action, but it is not material in this connection that it may be erroneous."

The foregoing text is quoted with approval by the Supreme Court of Arizona in Brandt v. Meade, 17 Ariz. 34, 147 P. 738.

> Similiarly in Ruling Case Law, Vol. 15, p. 904 it is said:
>
> "Ordinarily the effect of an appeal to a court of error, when perfected, is only to stay execution upon the judgment from which it is taken. In all other respects the judgment, until annulled or reversed, is binding upon the parties, as to every question directly decided, and an action on the judgment is not barred by the fact that the judgment has been removed by writ of error to a superior court. Similiarly, if by the law of the state where a judgment is obtained an appeal does not

> stay proceedings on the judgment, the pendency of such appeal is not a bar to an action on the judgment in another state. On the same principle a judgment may be enforced by an action, although a petition has been filed in the trial court to reduce the amount of such judgment."

The Supreme Court of Arizona, in Ariz. Mut. Auto Ins. Co. v. Bernal, 23 Ariz. 276, has passed on the identical question, saying:

> "We conclude that a cause of action against appellant existed in this case when appellee obtained her final judgment against Miranda for the injury she sustained during the life of the policy and concededly covered by its terms, and that the obligation to pay such judgment, within the limits of the policy, directly to her, arose when she demanded its payment by the company."

Thus plainly indicating that the judgment is final for the purpose of action against the insurance company when rendered by the Superior Court. The only means of suspending the right to sue on such a judgment is, as indicated by R. C. L., supra, to give a supersedeas bond and stay further proceedings pending determination on appeal. That case concerned the construction of the same endorsement and the decision of the State Court is, under the prevailing rule, binding upon Courts of the United States.

In Sweet v. Sherman, 21 Vt. 23, it is said:

> "The judgment obtained in the lower court is the 'final judgment' in the suit, even though the case

> is pending in the Supreme Court, within the meaning of Rev. St. etc."

And in 1 Cyc. 31, on Abatement and Revival, it is said:

> "An action to enforce a judgment cannot be defeated by the pendency of an action by the judgment debtor to set such judgment aside."

See also: Boyle v. Mfg. Liability Ins. Co. 115 A. 383; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Dow. v. Blake, 35 N. W. 761, 39 A. S. R. 156; Faber v. St. Louis etc. R. Co. 19 Am. Rep. 398; Sublette v. St. Louis etc. R. C. 66 Mo. App. 331; Riley Bros. v. Hoyt, 25 N.J.L. 230; Woodward v. Carson, 86 Pa. St. 176; Dawson v. Daniel, 7 Fed. Cas. 3,668; Wehrhahn v. Ft. Dearborn Cas. Underwriters, 1 S. W. (2d) 242; Ind. Ins. Co. v. Davis, 143 S. E. 328.

Therefore, the pendency of an appeal does not affect the finality of a judgment unless a supersedeas or stay bond is given as required by statute, or unless, by the laws and practice of the state, the perfecting of an appeal ipso facto suspends execution; an action may be instituted upon the judgment in another state and the pendency of an appeal in the state where the judgment was rendered may not be pleaded in bar or in abatement.

This is the rule of the authorities under the faith and credit clause of the Constitution, and the Courts of the United States are bound to give judgments of the state courts the same faith and credit that courts

of one state are bound to give the judgments of the courts of her sister states. Cooper v. Newell, 173 U. S. 567, 19 S. Ct. 506, 43 L. Ed. 808; Wisconsin v. Pelican Ins. Co. 127 U. S. 291, 8 S. Ct. 1370, 32 L. Ed. 239; Galpin v. Page, Sawy. 93, 9 Fed. Cas. No. 5,206. The situation of this case is, therefore, no different than if it were pending in the courts of the State of Arizona, or in the courts of any other state.

The question came incidentally before the Supreme Court of Arizona in Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001, where the effect of the same inurement clause was considered.

They say:

> "It appears from what we have said that the words 'loss and damage' mean a real loss—one at least so far as the indemnity company is concerned, that has been *put into judgment* against the assured."

also

> "One of the terms of the policy is that the injured person must first *establish his claim by suit* against the assured."

again

> "— — it was within the contemplation of the contracting parties that the injured person must first established his claim against the wrongdoer in his action for negligence and thereafter be assured of the fruits of his victory from the indemnity company."

All that is required of the injured party is that he establish the amount of his unliquidated claim of damages by judgment to be entitled to direct recourse against the indemnity company. If the latter, being the real party in interest, is not satisfied with the amount thus fixed it must ,if it desire to suspend further effort to collect, give a supersedeas bond. The plaintiff has obtained his judgment, in all respects final, and is entitled to proceed by action against the insurer. Nor is it of any consequence that the insurer may thus be required to secure plaintiff in a sum far in excess of its liability under the policy. Seessel v. New Amsterdam Casualty Co. 204 S. W. 428. In that case it was said:

> "The fact that, if the defendant had provided security upon the supersedeas bond, its liability would have been increased beyond the amount of the indemnity in the policy, did not justify the company in refusing to either pay to the limit of its policy or defend the suit. The prospective financial condition of the complainant, the possibility of a judgment against him for more than $5,000, and the liability incident to making a supersedeas bond to cover such a judgment, are matters which the indemnity company should have had in contemplation, and the risk incident thereto rightfully falls upon it. The law does not release a party to a contract from liability already incurred, because, in order to remove that liability, it becomes necessary to incur the risk of greater liability. It has been held by other courts, in construing policies containing conditions essen-

> tially similiar to these, that the obligation was upon the surety, when dissatisfied with the judgment obtained against the principal, to provide the bond for appeal and protect the insured from execution until the suit is terminated."

To the same effect are Rochester Mining Co. v. Md. Cas. Co., 128 S. W. 204, and Pacific Coast Cas. Co. v. Bonding & Cas. Co., 240 Fed. 36 (9th C.)

The precise question here involved was considered in Pape v. Red Cab. Mut. Cas. Co., 219 N.Y.S. 135. An indemnity insurance policy, given under the Highway Law of New York, bound the insurer to pay on "final determination of the litigation after trial of the issue." The court held this expression to be synonymous with "final judgment", and, after stating the latter expression is susceptible of two significations, said:

> "One, which in a strict legal sense is its true meaning, viz: a determination of the rights of the parties after a trial, whether such is the subject of review or not; and the other, its colloquial use or signification, which makes it synonymous with decisive, or a judgment that cannot be appealed from, and which is perfectly conclusive upon the matter adjudicated."

Continuing, the Court said:

> "The express language of the clause in the policy would seem to indicate that it was not intended to fix the insurer's liability upon the determination of the litigation beyond all possibilities of appeal. If there were any doubt in the matter it is disposed of by the mandatory language of the statute

> which makes the indemnitor liable "for the payment of any judgment recovered" against the principal. A reasonable construction of the statute obviously requires that such a judgment must be enforceable by execution, and that a stay thereof pending appeal suspends the liability of the insurer: otherwise, in case of a reversal upon such appeal, the indemnitor would remain bound although the principal had been excused. Undoubtedly this would produce a rather anomalous situation."

The question there raised, as here, was whether, by reason of the pendency of an appeal in the action against the principal, there was such a final determination of the main litigation as to impose any liability under the policy. See also Indemnity Ins. Co. v. Davis, 143 S. E. 328.

If the plea in abatement were good an injured person would be held away from his recovery by a frivlous appeal which could in any case be taken by the mere giving of a bond for costs, and without giving any security which would compensate plaintiff for the intervening loss of time. Defendant should be required to substitute its liability in an action such as this for its liability on a supersedeas bond. This would preserve equality between the parties.

A careful reading of appellant's authorities concerning the meaning of the term "final judgment" will reveal the following:

In Dean v. Marshall, 35 N.Y.S. 724, a stipulation of

the parties provided for an appeal and payment after final determination. Obviously this means after the appeal which was in contemplation of the parties;

In Blanding v. Sayles, 49 Atl. 992, and Bixler's Appeal, 59 Cal. 550, the judgments were judgments in special proceedings which, by statute, were made final, the court construing "final" to mean "final and conclusive", so that no appeal would lie;

In Annis v. Bell. 64 P. 11, the statute provided for a stay of judgment by appeal in that character of case.

Obviously, none of these cases is any authority for appellant's proposition, and do not approach, in point of authority, the cases cited above which have direct reference to the efficacy of an appeal to stay a judgment upon suit in another jurisdiction where execution has not been superseded in the court where the judgment was rendered.

Wolf v. District Court Northern California, 235 Fed. 69, is not in point, for the reason that there the judgment was in an action to quiet title and not a personal judgment for the recovery of money, hence no supersedeas was necessary to suspend the finality of the judgment. This holding is perfectly consistent with the cases heretofore cited which hold that where the taking of the appeal itself suspends the judgment, and prevents its enforcement in the court below, no action can be maintained on the judgment in another court during the pendency of the appeal.

Fidelity & Casualty Co. v. Fordyce, 41 S. W. 420, cited in appellant's brief, is not in point. The policy there did not bind the insurance company to pay on "final judgment" in favor of the injured person. The essential language of the policy here involved was there conspicuously absent. Neither were the rights of any injured third person directly involved in that case. The same is true of Schroeder v. Columbia Cas. Co. 213 N.Y.S. 649.

The Court will bear in mind the distinction between indemnity against "loss", and indemnity against "liability imposed by law." In the former recovery can be had only where the assured has actually paid the judgment; in the latter where the amount of the recovery has been fixed by judgment. The pendency of an appeal from such a judgment does not affect the rights of a person for whose benefit the insurance was given unless the finality of the judgment has been stayed in the manner required by statute.

SECOND ASSIGNMENT

The second assignment charges error in the refusal of the court to permit the filing of an amended demurrer and answer on the day of trial. It is not, however, charged that such refusal was an abuse of discretion. It will be noted from the record and from appellant's brief, that appellant filed first its general demurrer and plea in abatement, the former of which was stricken as frivolous and the latter as sham, and judgment rendered notwithstanding the same under R. S. A. par. 473.

There is nothing in our practice to prevent appellant from having interposed at that time all of its defenses. Indeed our practice statute, par. 467, requires that all pleas, both as to law and fact, shall be filed at the same time, including (sub-division 2) matters in abatement of the suit. After the summary judgment was vacated appellant was permitted to file the answer, consisting of the same general demurrer and a full answer to the merits, which was submitted in connection with its motion to vacate. Appellant might then have set up its additional answers had it so chosen and thereby made its showing stronger. It thus readily appears that appellant had ample opportunity on two occasions before the setting of the case for trial to interpose its complete defense.

The refusal to permit the filing of an amended answer was an exercise of discretion by the court. Our statute, chap. 14, Sess. Laws 1925, amending par. 422 R. S. A. 1913, requires amended pleadings to be filed not less than five days before trial without special leave. Appellant had previously exhausted its right of amendment of course under Rule 15 of the District Court, and failed to comply with Rule 18 with respect to motion and notice for leave to amend. Therefore, under neither the practice act of Arizona, nor the rules of the District Court, had appellant any right to further amend, and in view of the fact that additional defenses were interposed and submitted for leave to file on the day of trial, without opportunity to appellees to prepare, appellant having had ample

time before to file all of its defenses, it is difficult to see how the refusal of the court could be held error, not to say an abuse of discretion.

Neither of the two additional defenses, however, had any apparent merit. The first set up failure to give twenty days' notice of the accident, notwithstanding the complaint alleged, and the answer admitted, (paragraph VI, respectively) that this defendant appeared for and represented George Ross, the assured, throughout the suit in the state court which resulted in the judgment herein sued on. It appeared to the court from the pleadings then on file that appellant had notice of the occurrence of the accident and had actually conducted the defense of the other suit, which was the only utility of notice under the inurement clause. Notice is given to impart knowledge, not to apprise a party of facts which are already in his possession. In this connection, 36 C.J. p. 1109, Sec. 98, says:

> "By assuming the defense of the action against insured, insurer may be precluded from avoiding liability on the ground that insured has failed to comply with a provision of the policy requiring him to give immediate written notice of an accident."

If this is true between the immediate parties, how much more true should it be between the insurer and a third person for whose benefit the contract of insurance was made. The first separate defense was, therefore, both sham and frivolous, and the court properly

refused permission to file it. (Tr. Rec. 42).

The second separate defense set up the liability limits of the policy. This raised no issue which could not have been proved under a general denial, (Tr. Rec. 42) and appellant is now urging its point with respect thereto under the pleadings therefore on file. The question is fully raised by plaintiffs' own evidence.

The special demurrer alleged that two causes of action were improperly united. The judgment sued on was rendered for injuries to both plaintiffs, husband and wife, and this action seeks a recovery under the judgment and policy for the benefit of both. Since the judgment is joint they are properly joined as plaintiffs. The cause of action is entire, not several. If their joinder was not proper that question should have been raised in the state court. Not having been raised there it is res adjudicata and cannot now again be litigated. This Court will not go behind the judgment of the state court any further than may be necessary to ascertain the identity of the issues tried. The judgment being joint, the recovery here may be joint to the full limits of the insurance to two persons, provided, only, the Court finds that injuries to two injuries were pleaded, proved, submitted to the jury and found by them. 36 C. J. 1121, has the following to say:

> "Where the insurer is notified of the pendency of an action against insured in reference to an injury or liability covered by the policy and is given an opportunity to defend such action as required by

> the policy, whether it does or does not defend or take part in such action, a judgment against insured therein is conclusive upon insurer as to all questions determined which are material to a recovery against it in an action on the policy, and the pleadings, instructions, and verdict in such prior action are admissible to determine what issues were tried therein. - - where the defense therein was conducted by insurer it is not entitled in an action on the policy to any defense that it might have raised on the trial of the other action."

However, under all of the authorities that have passed on the question claims for injuries to husband and wife are community property and both may be joined in a single action as elements of one cause of action. Bancroft's Code Pleading, Vol. 3, p. 2492; Labonte v. Davidson, 175 P. 588; Ezell v. Dodson, 60 Tex. 331; Hawkins v. Front-Street Cab. Ry. Co., 28 P. 1021 (Wash.)

This is upon the theory that all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is community property; that a claim for damages to either or both is a chose in action, and consequently property, and does not fall within any of the exceptions. As an acquest to the community each has a vested interest in the recovery of the other.

Hawkins v. Front Street, supra, is a Washington case, and the Arizona Supreme Court has held (Cosper v. Valley Bank, 28 Ariz. 373, 237 P. 175) that the Arizona statute relating to community property

follows the views prevailing in that state. It is, therefore, also the law of Arizona that injuries to both husband and wife, or claims of either on account thereof, being parts of the community in which each has a vested interest, may be sued for and recovered in a single action, and that such is not an improper joinder of parties or of actions.

Obviously all of the authorities cited by defendant under this topic follow the common law rule and are not authority in jurisdictions where the more modern doctrines of community property rights obtain. This rule, of course, has relation only to actions for injuries to husband and wife.

THIRD ASSIGNMENT

The third assignment charges error in the admission in evidence of the printed Abstract of Record prepared and filed by appellant in the Supreme Court of Arizona on appeal from the judgment against its assured, showing the pleadings, instructions, verdicts, and judgment in the former action. There was no denial in the answer that a judgment of the character, and in favor of the persons, and upon the cause of action, alleged in the complaint was rendered. In fact paragraph VI of the answer admits that fact. It therefore became necessary only to prove its terms, and the issues joined, submitted and determined which resulted in the judgment.

State court judgments are not foreign judgments in courts of the United States of that District, and the

exemplification act does not apply to them. Reliance is placed by appellant upon the provisions of Rule 43 of the District Court, and par. 1739, R. S. A. 1913, with reference to the mode of proving public records. Suffice it to say that there is nothing in that statute which makes the method therein indicated the exclusive mehod of proving the contents of public records. Its provisions are permissive merely, and not mandatory. The existence of the judgment pleaded was admitted by appellant, and the proof offered of the terms of the record was of a character conclusive and binding upon it. Appellant, itself, prepared and filed the record admitted, in the Supreme Court of Arizona. The copy introduced showed by the printed inscription that it was prepared by present counsel for appellant, who, paragraph VI of the answer admits, represented George Ross, as the insured, throughout the suit in which the judgment was rendered. Mr. Holton, of counsel for appellant, admitted on the stand that the Abstract of Record was prepared in his office and filed in connection with the appeal set up in the plea in abatement. Appellant was, therefore, estopped to question the correctness of the contents of the Abstract, since the only materiality of the record was proof of the terms and effect of the pleadings, instructions, verdicts and judgment. There is no suggestion by appellant that the Abstract does not correctly show those portions of the record, nor could any such position be taken without admitting that a fraud had been practised on the Supreme Court.

This assignment, if technically sustainable, is error without prejudice.

FOURTH ASSIGNMENT

Under this assignment it is urged that the admission of the policy as plaintiffs' exhibit 2 was error, in that it was not made to appear that the Paige sedan therein described was the automobile which occasioned the accident and is referred to in the complaint. This policy, at a former stage of the case, was introduced by appellant in support of its plea in abatement, and upon trial of the action was produced by appellant from its files after its number had been given in evidence from the records of the Corporation Commission, as the policy of George Ross in effect on the date of the accident. There never was but one automobile concerned in either cause. The same policy was offered in evidence twice, once by appellant and once by appellees. Appellant, by offering the policy in support of its plea in abatement, conclusively admitted that the automobile described is the one which occasioned the accident for which the judgment was rendered, and the one referred to in the complaint. On no other theory could it be material under the plea in abatement.

Moreover, as the issues were finally joined no question was raised that the automobile which occasioned the accident, the one referred to in the complaint, and the one described in the policy, was not one and the same. The plea in abatement alleges liability in-

surance coverage, together with the terms of the inurement clause endorsed by rule of the Corporation Commission; par. II of the complaint alleges that Ross used in connection with his taxi business one certain Paige sedan automobile, which is admitted by par. II of the answer; pars. III and IV of the complaint allege that Ross was required to and did obtain from defendant and file, with the inurement clause, a policy of insurance covering *said* Paige sedan, and par. IV of the answer alleges substantially the same facts; par. V of the complaint sets up the accident and injuries to plaintiffs, and each of them, which occurred by means of said Paige sedan, which is denied by the same paragraph of the answer; but par. VI of the complaint alleges that judgment for $15,000, in favor of plaintiffs, jointly, was recovered against Ross on account of *said* injuries, sustained by means of *said* Paige sedan, which is ADMITTED by the corresponding paragraph of the answer. In other words appellant denied the occurrence of the accident by said Paige sedan, but admitted that the judgment on account thereof, by means of the same car, was rendered. The latter is the only material fact. Whether that car was really the one involved in the accident, as well as whether Ross was really at fault, was determined by the former judgment and is now res adjudicata and cannot be litigated again. 36 C. J. 1121, supra. That fact, having once been determined, it is immaterial that appellant continues to deny it.

There is nowhere in the pleadings any suggestion

of a denial that the car which caused the accident was covered by a policy of the defendant. In fact, as we have shown, the conclusion is the other way. Par. II of the second separate defense, leave to file which was refused, and which appears on pages 41-42 of the Transcript, alleges merely lack of information upon which to base a belief. Manifestly, this is not good faith. The automobile was the property of their insured whose defense they conducted. Their insured knew what automobile was involved in the accident, and under their policy he is required to assist them in every manner. There is privity of contract between them and whatever is imputable to the knowledge of one is equally imputable to the knowledge of the other. The identity of the vehicle covered, being peculiarly within the knowledge of appellant, the burden was upon it to prove that the Paige sedan which occasioned the accident was *not* covered by their insurance, or by the policy doubly placed in evidence. The character of this assignment is obvious.

FIFTH AND SIXTH ASSIGNMENTS

These assignments charge error in the reception in evidence of plaintiffs' exhibits 3 and 4, being correspondence with Standard Agency, Inc., of Phoenix, respecting the accident. The letters are dated July 7th and 11th, respectively, (within a week after the accident which occured on July 2d). Appellant makes the error of treating this correspondence as with B. F. Hunter personally. The fact is that letters were addressed to him as adjuster, and his letter is signed

below the name "STANDARD AGENCY, INC.", as adjuster. It will be noted that the policy (pp. 27-28, 40, 78, Tr. Rec.) was countersigned by STANDARD AGENCY, INC., so there is no question about that company being the proper party to notify of the accident. Regardless of how the initial letter was addressed it fully appears that ultimate notice reached the accredited representative of the insurer well within th required twenty days. It will be observed that on page 73 of its brief appellant admits that "its agent was THE STANDARD AGENCY, INC., at Phoenix, Arizona." The agent being corporate appellees could not control the identity of the individual who should give the matter attention.

However, the giving or failure to give notice was not a material issue in the case, as we have shown under the second assignment, supra, appellant having previously conducted the defense of its insured and being fully aware of all the facts. A casual perusal of the reporter's transcript introduced herein sufficed to show the trial court that appellant was well prepared for the defense of the prior action. The most formal notice would not have been of any additional help.

SEVENTH ASSIGNMENT

The error urged in connection with this assignment is the refusal of the court to strike the Abstract of Record, and has been fully treated above.

EIGHTH, NINTH AND TENTH ASSIGNMENTS

These are treated under the 13th, 14th and 15th assignments.

ELEVENTH AND TWELFTH ASSIGNMENTS

These assignments charge error in the refusal to permit counsel for appellant to testify that counsel for appellees, in the former action, stated in his argument to the jury that he did not claim damages on account of injuries to plaintiff, L. A. Clark. This is in the nature of a collateral attack upon, or impeachment of the record, and was properly rejected. Had such an admission been made appellant, as the defendant in the former suit, should have requested of the court an appropriate instruction to the jury. Otherwise the jury would not be limited in the findings it made under the evidence and instructions. Appellant concedes that their insured, Ross, could not now be heard to complain that no segregation was made in the verdict or judgment. How, then, can this defendant-appellant, who stood in the substituted place of Ross and who is as firmly bound by the former record as Ross himself, be heard to question any of the former proceedings?

THIRTEENTH, FOURTEENTH AND FIFTEENTH ASSIGNMENTS

The matters covered by these assignments have been fully considered above. There is only one new point: that the evidence failed to show any apportionment between plaintiffs. It is urged that the principle of

estoppel by judgment does not extend to a record which fails to show upon which of two or more independent causes of action or defenses the judgment was rendered. The complaint in the state court was in three counts, the first for simple negligence for personal injuries, the second the same with an allegation of gross negligence, wantonness and intoxication, and the third simple negligence for damages to plaintiff's car. The Arizona statute allows actions for the recovery of damages for injuries to the person and property, growing out of the same tort, to be sued for in the same action, if separately stated. Par. 427 as amended by Chap. 34, Sess. Laws 1921. The third count was dismissed at the conclusion of plaintifffs' main case, and the instructions of the court show (Tr. Rec. pp. 104-105) that the cause was submitted to the jury on the first two counts, the only difference between which was the allegation appropriate to the recovery of punitive damages, and the prayer therefor. The verdict is segregated as between these two items of recovery, one verdict for $12,000 being for compensatory damages, and the other for $3,000, punitive dameges. (Tr. Rec. pp. 117, 119). It can, therefore, be ascertained with certainty from a bare inspection of the record just what the jury found upon the issues as joined, proven and submitted. This is all that is required and appellant's position with reference to the rule on estoppel by record is not well taken.

The court, under the authority of 36 C.J. 1121, supra, looked to the pleadings, transcript of the evi-

dence, instructions and verdicts in the former action to determine what issues were tried therein, and found therefrom that the verdicts and judgment rendered thereon were for injuries sustained by both plaintiffs. They, being husband and wife, under our community property statute, were enabled to maintain one action for the recovery of both, and their right of recovery here is as broad as the right obtained under the judgment in the former action. Appellant represented the nominal defendant in the former suit and was in practical effect the defendant in that action. It knew that a joint action was being maintained, and that a joint judgment was sought. It knew also its interest in the suit as well as the provisions of the policy, and if it desired to avoid the situation now presented it should have asked and obtained a segregation of the verdicts, or at least the one for actual damages, as between the plaintiffs. The matter of which appellant now complains was peruliarly its own neglect and it cannot now take advantage of it. Morrell v. Lalonde, 120 Atl. 438.

Brookside-Platt Mining Co. v. McAlister, 72 So. 18, relied on so strongly by appellant is no authority for it. That was an Alabama case where the rule governing acquisitions of the marital community is radically different from Arizona. A husband and wife, in Arizona, have a joint interest in the recoveries of each other for bodily injuries, and can maintain a joint action therefor. (Hawkins v. Front-Street, supra.) The McAllister case is clear authority for the proposition

that where persons have a joint interest they must sue jointly for an injury to it, on the theory as there announced, that it is not the injury but the consequences flowing from it that gives the right of action. In addition, our par. 403 requires joinder of husband and wife in actions to which the wife is a party, except where the subject matter concerns her separate property. This is for no other reason than that the husband has a joint interest (or liability) in whatever concerns his wife, to which interest he may join his own claim.

Appellant contends it is not liable in any event for punitive damages. On this question Morrell v. Lalonde, 120 Atl. 435, says:

> "The defendant insurance company by the terms of its liability policy agreed to indemnity defendant to the amount stipulated therein 'against loss from the liability imposed by law upon the assured for damages on account of *bodily injuries* or death suffered by any person or persons in consequence of any malpractice, error or mistake of the assured in the practice of his profession.' The defendant company was liable to the amount insured to pay any lawful damages which in a case, such as the case at bar, includes punitive as well as compensatory damages."

At all events, the judgment of the Supreme Court of Arizona on appeal, and the remittiturs which have been filed in pursuance of its directions, satisfies every legitimate requirement of appellant with respect to apportionment of damages between the plaintiffs.

Those remittiturs reduce the amount of the verdicts to the amount of appellant's contractural liability and do not disturb the essential basis upon which the judgment here appealed from rested.

Moreover, the judgment appealed from is not as great in amount as it should have been under the terms of the policy. Sub-division (3), Tr. Rec. p. 67, is as follows:

> (3) To Pay, irrespective of the limits of liability expressed in Statement 8 of the Schedule of Declarations, all *costs* taxed against the Assured in any legal proceeding defended by the Corporation, all *interest* accruing after entry of judgment upon such part thereof as shall not be in excess of said liability- - - "

Appellant is liable, therefore, in addition to the amount of the state court judgment, not in excess of $10,000, for the costs taxed against Ross, $196.35, (Tr. Rec. 119), and interest on $10,000 from November 9, 1927, until paid, at the rate of six per cent. per annum. It will be noted the judgment in this action (Tr. Rec. 34) is for $10,000, and costs herein assessed at the sum of $29.60.

It is, therefore, respectfully submitted that the judgment herein is for an amount not in excess of appellant's liability, and, the judgment of the state court not having been reduced below that amount, no occasion exists for disturbing the effect given it by the trial court and the judgment should be affirmed with directions to enter judgment in favor of appellees for

$10,000, with interest thereon from November 9, 1927, until paid, at the rate of six per cent. per annum, for $196.35 costs in the state court, and costs herein.

Respectfully submitted,

LEROY ANDERSON
LEO T. STACK
ANDERSON AND GALE,

Attorneys for Appellees.

No. 5689

10

United States

Circuit Court of Appeals

For the Ninth Circuit.

ALAMEDA INVESTMENT COMPANY, a Corporation, HAWLEY INVESTMENT COMPANY, a Corporation, and PACIFIC NASH MOTOR COMPANY, a Corporation,

Appellants,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

DANA LATHAM, Esq., 410 Title Insurance Bldg., Los Angeles,
THORNTON WILSON, Esq., Ray Building, Oakland,
Attorneys for Plaintiffs.

UNITED STATES ATTORNEY, San Francisco,
Attorney for Defendant.

In the United States District Court for the Northern District of California, Southern Division.

AT LAW—No. 17,765.

ALAMEDA INVESTMENT COMPANY, a Corporation, HAWLEY INVESTMENT COMPANY, a Corporation, PACIFIC NASH MOTOR COMPANY, a Corporation,
Plaintiffs,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California,
Defendant.

COMPLAINT.

To the Honorable Judges of Said Court:

Come now the plaintiffs, Alameda Investment Company, Hawley Investment Company and Pa-

cific Nash Motor Company, corporations organized and existing under the laws of the State of California, and for cause of action against the defendant, John P. McLaughlin, allege:

1.

That the jurisdiction of this court is dependent upon a Federal question in that the case arises under a law providing for internal revenue, to wit: Section 240 of the Revenue Act of 1921 (42 Stat. L. 260).

2.

That the defendant, John P. McLaughlin, is United States Collector of Internal Revenue for the First District of the State of California, duly commissioned and acting pursuant to the laws of the United States, and resides and has his office in the City and County of San Francisco in [1*] said State.

3.

That this action is brought against the defendant as an officer acting under and by authority of the Revenue Act of 1921, on account of acts done under color of his office and of the revenue laws of the United States, as will hereinafter more fully appear.

4.

That the plaintiff the Alameda Investment Company is and was at all times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and

*Page-number appearing at the foot of page of original certified Transcript of Record.

engaged in the business of owning and managing properties and securities, with its principal place of business and office in the city of Oakland, County of Alameda, in said State; that the plaintiff the Hawley Investment Company is and was at all times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and engaged in the business of owning and managing properties and securities, with its principal place of business and office in the city of Oakland, County of Alameda, in said State; that the plaintiff, the Pacific Nash Motor Company is and was at all times hereinafter mentioned duly organized and existing under and by virtue of the laws of the State of California and engaged in the business of buying and selling automobiles and automobile securities, with its principal place of business and office in the city of Oakland, County of Alameda, in said State.

5.

That at all times during the calendar year 1922 the plaintiff Alameda Investment Company had an authorized [2] and outstanding capital stock of five hundred thousand dollars ($500,000.00), divided into two thousand five hundred (2,500) shares of the par value of two hundred dollars ($200.00) each, all of which capital stock was owned or controlled by Stuart S. Hawley, an individual residing in Oakland, California, who was also plaintiff's president and general manager and in active management and control of all the affairs of plaintiff Alameda Investment Company.

6.

That at all times during the calendar year 1922 the said Stuart S. Hawley was also president and general manager and in active management and control of the affairs of the plaintiff Hawley Investment Company, and said Stuart S. Hawley owned and controlled all the authorized and outstanding capital stock of said corporation, consisting of two thousand five hundred (2,500) shares of the par value of one hundred dollars ($100.00) each.

7.

That at all times during the calendar year 1922 said Stuart S. Hawley was president of and in active control of the affairs of the plaintiff Pacific Nash Motor Company, and said Stuart S. Hawley owned or controlled all the authorized and outstanding capital stock of said corporation, consisting of three thousand five hundred (3,500) shares of the par value of one hundred dollars ($100.00) each.

8.

That all the stock of the plaintiff Alameda Investment Company, plaintiff Hawley Investment Company and plaintiff Pacific Nash Motor Company was owned by the same interests, to wit: said Stuart S. Hawley, and said corporations [3] were affiliated during all of the calendar year 1922, as provided by Section 240 of the Revenue Act of 1921, and entitled to file a consolidated return of income and to have their income tax liability computed upon the income of said three corporations plaintiff as a unit.

9.

That said three corporations plaintiff as a unit had no taxable net income for the calendar year 1922, but suffered a net loss of one hundred forty-four thousand two hundred eight dollars and ninety-four cents ($144,208.94).

10.

That notwithstanding that the plaintiff Alameda Investment Company, the plaintiff Hawley Investment Company and the plaintiff Pacific Nash Motor Company as a unit suffered a net loss for the calendar year 1922 and were not individually or severally liable for any income tax, said plaintiff corporations through inadvertence and without knowledge that they were entitled to file a consolidated return of income on or about March 15, 1923, filed with the defendant separate returns of income for the calendar year 1922. As set forth in detail in said returns, the plaintiff Hawley Investment Company suffered a net loss for the year 1922 of thirty-six thousand two hundred eighty-four dollars and twenty-eight cents ($36,284.28); the plaintiff Pacific Nash Motor Company suffered a net loss for the year 1922 of two hundred twenty-eight thousand six hundred twenty-six dollars and forty-two cents ($228,626.42); and the plaintiff Alameda Investment Company derived a net income for the calendar year 1922 of oue hundred twenty thousand seven hundred one dollars and seventy-six cents ($120,701.76). [4]

Upon the separate return filed by the plaintiff Alameda Investment Company for the year 1922

its income tax liability was shown to be fifteen thousand eighty-seven dollars and seventy-two cents ($15,087.72), which said income tax liability was paid by the plaintiff Alameda Investment Company to defendant under protest in four installments, as follows, to wit:

$3,125.00	March 13, 1923
4,455.42	June 15, 1923
3,709.43	September 14, 1923
3,697.87	December 14, 1923.

11.

That thereafter the plaintiff Alameda Investment Company, the plaintiff Hawley Investment Company and the plaintiff Pacific Nash Motor Company learned that they were entitled to file a consolidated return of net income for the calendar year 1922 and for prior years and to have their income tax liability for the year 1922 and prior years computed as a unit; and on June 11, 1924, said corporations plaintiff applied to the Commissioner of Internal Revenue for permission to and they did file with the defendant consolidated returns of income for the years 1920, 1921 and 1922.

12.

On the same date, to wit, June 11, 1924, plaintiff Alameda Investment Company, plaintiff Hawley Investment Company and plaintiff Pacific Nash Motor Company filed with the defendant a claim for the refund of the tax amounting to fifteen thousand eighty-seven dollars and seventy-two cents (15,087.72) paid by the plaintiff Alameda

Investment Company to the defendant as aforesaid on a separate return of its net income for the year 1922. [5]

13.

That thereafter the Commissioner of Internal Revenue audited the separate and consolidated returns which the plaintiff corporations Alameda Investment Company, Hawley Investment Company and Pacific Nash Motor Company filed with the defendant as aforesaid, for the years 1920, 1921 and 1922, and determined as set forth in his letter of October 14, 1925, that the plaintiff Hawley Investment Company and the plaintiff Pacific Nash Motor Company should be permitted to file a consolidated return for the calendar year 1922, but that the plaintiff Alameda Investment Company was not so affiliated with the said plaintiff Hawley Investment Company and the plaintiff Pacific Nash Motor Company nor entitled to have its income included in said consolidated return.

14.

That thereafter the Commissioner of Internal Revenue examined the claim for refund which the plaintiffs filed as aforesaid for the refund of the tax amounting to fifteen thousand eighty-seven dollars and seventy-two cents ($15,087.72) which the plaintiff Alameda Investment Company paid to defendant on its separate income for the calendar year 1922, and by letter dated June 29, 1926, rejected said claim for refund in its entirety, and neither the whole nor any part nor portion of said

[Title of Court and Cause.]

SUMMONS.

Action brought in said District Court and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

DANA LATHAM,
THORNTON WILSON,
Plaintiffs' Attorneys.

The President of the United States of America, GREETING: To JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this summons, if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract or they will apply to the Court for any other relief demanded in the complaint.

WITNESS the Honorable FRANK H. KERRIGAN, Judge of said District Court, this 16th day of May in the year of our Lord one thousand

nine hundred and twenty-seven and of our independence the one hundred and fifty-second.

[Seal] WALTER B. MALING,
Clerk.
By A. C. Aurich,
Deputy Clerk. [9]

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY that I received the within writ on the 16th day of July, 1927, and personally served the same on the 16th day of July, 1927, upon John P. McLaughlin etc., by delivering to, and leaving with John P. McLaughlin as Collector of Internal Revenue for the first District of California, said defendant named therein personally, at the City and County of San Francisco, in said District, a certified copy thereof, together with a copy of the complaint, attached thereto.

FRED L. ESOLA,
U. S. Marshal.
By GEO. H. BURNHAM,
Office Deputy.

San Francisco, July 16th, 1927.

[Endorsed]: Filed July 19th, 1927. [10]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

The defendant demurs to the complaint on file herein on the ground:

That the complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that plaintiffs take nothing by their said action but that the defendant recover his proper costs.

Dated: November 10, 1927.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Nov. 10th, 1927. [11]

At a stated term of the Southern Division of the District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 28th day of November, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—NOVEMBER 28, 1927—
ORDER OVERRULING DEMURRER.

By consent, IT IS ORDERED that the demurrer to the complaint herein, be and the same is hereby overruled, with leave to answer within ten days [12]

[Title of Court and Cause.]

ANSWER TO COMPLAINT.

Comes now the defendant, John P. McLaughlin, and for answer to the complaint in the above-entitled action, admits, denies and alleges as follows:

I.

Admits the matters and things in Paragraph I of said complaint.

II.

Admits the matters and things in Paragraph II of said complaint.

III.

Admits the matters and things in Paragraph III of said complaint.

IV.

Admits the matters and things in Paragraph IV of said complaint.

V.

Defendant has no information or belief to answer the allegations of Paragraph V of said complaint, and therefore denies each and every allegation in said paragraph.

VI.

Defendant has no information or belief to answer the allegations of Paragraph VI of said complaint, and therefore denies each and every allegation in said paragraph.

VII.

Defendant has no information or belief to an-

swer the allegations of Paragraph VII of said complaint, and therefore denies each and every allegation in said paragraph. [13]

VIII.

Answering the allegations of Paragraph VIII of said complaint, said defendant denies that the plaintiff, Alameda Investment Company, a corporation, plaintiff, Hawley Investment Company, a corporation, and plaintiff, Pacific Nash Motor Company, a corporation, were owned by the same interest, to wit, by Stuart S. Hawley, and that said corporations were so closely affiliated during all of the calendar year of 1922 as would entitle them under the Provisions of Section 240 of the Revenue Act of 1921 to file consolidated returns of income and to have their income tax liability computed upon the incomes of said three (3) corporations, plaintiffs, as a unit, but contends that plaintiff, Alameda Investment Company, was, under the Revenue Act of 1921, obligated to file, and did file, a separate return of their income tax liability for the calendar year of 1922.

IX.

Defendant has no knowledge or information to answer defendant's allegations in Paragraph IX of said complaint, and for that reason denies each and every allegation in said paragraph.

X.

Defendant has no information or belief that the plaintiff, Alameda Investment Company, a corporation, plaintiff, Hawley Investment Company, a cor-

poration, and plaintiff, Pacific Nash Motor Company, a corporation, as a unit, suffered a net loss for the calendar year of 1922 and therefore denies that this is a fact.

Defendant denies that plaintiff, Alameda Investment [14] Company, a corporation, plaintiff, Hawley Investment Company, a corporation, and plaintiff, Pacific Nash Motor Company, a corporation, were not individually or severally liable for any income tax, but asserts that plaintiff, Alameda Investment Company, was individually and severally liable for its income tax for the calendar year of 1922.

Defendant denies that any tax returns whatsoever were filed by plaintiff corporations through inadvertence, and particularly alleges that for the calendar year of 1922 the individual and several returns of plaintiff corporations were not filed through inadvertence, but same were properly filed according to provisions of the Revenue Act of 1921.

Defendant admits that on or about March 15, 1923, plaintiff corporations filed with the defendant separate returns of income for the calendar year of 1922.

Defendant admits that, as set forth in detail in said returns, the plaintiff, the Hawley Investment Company, was alleged to have suffered a net loss for the year 1922 of thirty-six thousand two hundred and eighty-four and 28/100 ($36,284.28) dollars; the plaintiff, Pacific Nash Motor Company, in said returns, was alleged to have suffered a net loss for the year 1922 of Two hundred and twenty-eight

thousand six hundred and twenty-six and 42/100 ($228,626.42) dollars; and in said returns it was alleged plaintiff, Alameda Investment Company, derived a net income for the calendar year of 1922 of one hundred and twenty thousand seven hundred and one and 76/100 ($120,701.76) dollars. [15]

Defendant admits that upon the separate return filed by the plaintiff, Alameda Investment Company, for the year 1922, its income tax liability was alleged to be fifteen thousand eighty-seven and 72/100 ($15,087.72), and defendant admits that said alleged tax liability was paid by the plaintiff, Alameda Investment Company, to this defendant in four (4) installments, as follows, to wit:

$3,125.00 Paid March 13, 1923;
4,455.42 Paid June 15, 1923;
3,709.43 Paid Sept. 14, 1923;
3,697.87 Paid Dec. 14, 1923.

Defendant asserts that all four (4) of these payments which were and should have been made by the plaintiff, Alameda Investment Company, under the provisions of the Revenue Act of 1921 and by virtue of a separate income tax liability return required to be filed under the provisions of said Act by said plaintiff, Alameda Investment Company.

XI.

Answering the allegations in Paragraph XI of said complaint, defendant denies that plaintiff, Alameda Investment Company, plaintiff, Hawley Investment Company, and plaintiff, Pacific Nash Motor Company, were entitled to filed a consolidated return of net income for the calendar year

1922 and for prior years and to have their income tax liability for the year 1922, and prior years, computed as a unit, but contends that the plaintiff, Alameda Investment Company, was, under the provisions of the Revenue Act of 1921, obligated to file an individual and several return of tax liability for the year 1922 and for prior years.

Defendant admits that said plaintiff corporations applied to the Commissioner of Internal Revenue for permission [16] to, and they did, file with the defendant, consolidated returns of income for the years 1920, 1921 and 1922.

XII.

Admits the matters and things in Paragraph XII of said complaint.

XIII.

Admits the matters and things in Paragraph XIII of said complaint.

XIV.

Admits the matters and things contained in Paragraph XIV of said complaint.

XV.

Answering the allegations in Paragraph XV of said complaint, said defendant denies that he erroneously and illegally collected, and is erroneously and illegally withholding from said plaintiff, Alameda Investment Company, said plaintiff, Hawley Investment Company and said plaintiff, Pacific Nash Motor Company said tax, but affirms that any taxes collected from any or all of plaintiff corporations were properly and legally collected by him.

Defendant denies that he is indebted to any of said plaintiffs in the sum of fifteen thousand and eighty-seven and 72/100 ($15,087.72) or any other sum whatsoever, or for any interest whatsoever, but, on the other hand alleges that the sum of fifteen thousand and eighty-seven and 72/100 ($15,087.72) dollars was properly and legally collected by defendant as United States Collector of Internal Revenue for the First District of California, from the plaintiff, Alameda Investment Company, and that defendant has never collected any income tax whatsoever from plaintiff, [17] Hawley Investment Company or plaintiff, Pacific Nash Motor Company, for the tax year 1922 and prior years computed as a unit or otherwise.

Defendant admits that no money whatsoever has been paid by defendant to plaintiffs, or any of them.

WHEREFORE defendant prays that plaintiffs take nothing by their said action, and that said defendant have judgment for proper costs and for such other and further relief as may be just and proper in the premises.

GEO. J. HATFIELD.
GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant. [18]

State of California,
Northern District of California,
City and County of San Francisco,—ss.

John P. McLaughlin, being first duly sworn, deposes and says:

That he is the defendant named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on information and belief and as to those matters that he believes it to be true.

JOHN P. McLAUGHLIN.

Subscribed and sworn to before me this 7th day of December, 1927.

[Seal] RAYMOND GASKINS,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Sept. 20, 1931.

[Endorsed]: Filed December 7th, 1927. [19]

[Title of Court and Cause.]

STIPULATION WAIVING JURY AND FOR SETTING OF TRIAL.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys, Thornton Wilson Esq., of Oakland, California, and Messrs. Miller, Chevalier & Latham, of Los Angeles, California, for the plaintiffs, and George J. Hatfield, United States Attorney for the Northern District of California, for the defendant, that the above-named case may be set for trial on April 2, 1928, before the Court without a jury.

Dated March ——, 1928.

THORNTON WILSON,
MILLER, CHEVALIER & LATHAM.
By MELVIN D. WILSON,
Attorneys for Plaintiff.

Dated March 24, 1928.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.

Dated ——, 1928.

[Endorsed]: Filed March 29th, 1928. [20]

[Title of Court and Cause.]

OPINION.

Three corporations (Alameda, Hawley, Pacific) sue the defendant collector to recover income taxes paid by Alameda for the year 1922. Each of them made return, but only Alameda was subject to and paid taxes. In 1924, they joined in an application for refund, on the ground that they were affiliated and entitled to make consolidated return upon which no taxes would have been due, which application was denied.

No objection to parties has been made. The Revenue Act of 1921, Section 240, provides that corporations which are affiliated within its meaning, may make separate or consolidated returns for 1922 and thereafter, whichever method elected to be continued unless the Commissioner permits otherwise;

and that "corporations shall be deemed to be affiliated (1)" (insert remainder of Sec. C sed section).

The object of the statute is taxation in proportion to net income, equality between taxpayers, and to that end to look through the corporate entities to ascertain the real taxpayer; and if the latter substantially owns or controls several corporate enterprises, to tax him only upon the net income he receives from all. With this object in mind, it seems clear that the control contemplated by the statute, is not mere authority but is beneficial interest, an interest in the taxpayer which would subject him to taxes and payment, and the burden of which would be lessened by consolidated returns. The benefit of the statute extends to him on whom is the hazard of the several enterprises. There is none such here. [21]

These are "family corporations" wherein all the Hawley stock was owned by the Hawley family and the Hawley corporation owned all the Pacific stock and 75% of the Alameda stock.

The remaining 25% of Alameda was owned by the Meek corporation, and Stuart Hawley, president of the plaintiffs managed the Meek by power of attorney from most of its stockholders.

It is clear that 75% of Alameda stock is not "substantially all" within the statute or otherwise.

And managerial authority of Meek by the president of plaintiffs, confers upon plaintiffs no beneficial interest in the other 25% of Alameda stock, nor hazard, nor liability in respect to taxes affect-

ing its owner. Hence was not that "control" of said 25% of Alameda which the statute contemplates, nor within the statute were plaintiffs affiliated.

If this be not correct, then several corporations without mutuality of interest save a common agent or manager could claim the benefit of the statute. In 1922 the corporations plaintiff elected to make separate returns, and have no right to recover taxes paid on that basis. It may be that in 1924 the Commissioner could have permitted amendment to consolidate the 1922 returns. If so, the power is discretionary only. He did not exercise it. The taxes were not "erroneously or illegally assessed or collected" and the court has no authority to in effect do what the Commissioner refused to do. Moreover, in assessment, collection and payment into the public treasury, the defendant collector was wholly without fault.

It follows that he cannot be subjected to the personal judgment to reimburse plaintiffs for their failure in tactics, which is sought in this action. The principle of Smietanka's Case, 257 U. S. 1, forbids, as does the general law of agents, representatives, officers, and like cases. See, also, Fox vs. Edwards, 287 Fed. 669.

That Section 1318 of said Revenue Act permits recovery of taxes "erroneously or illegally assessed or collected" regardless [22] of protest, does not serve to impliedly repeal these just principles, even if Congress has power to thus mulct an innocent collector for a taxpayer's default.

Judgment accordingly.

Defendant may present brief findings of ultimate facts in issue.

May 7, '28.

BOURQUIN, J.

[Endorsed]: Filed May 7, 1928. [23]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial on the 1st day of May, 1928, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the parties hereto, plaintiffs appearing by Dana Latham, Esq., their attorney, and the defendant appearing by Geo. J. Hatfield, Esq., United States Attorney for the Northern District of California, and Challis M. Carpenter, Esq., Assistant United States Attorney for said District, and evidence both oral and documentary having been received and the Court having fully considered the same, hereby makes the following findings of facts:

I.

The Court finds that at all times during the calendar year 1922, the plaintiff Alameda Investment Company had an authorized and outstanding capital stock of $500,000.00, divided into two thousand five hundred shares of the par value of $200.00 each, but it is not true that all of the said capital

stock was owned or controlled by Stuart S. Hawley or that substantially all of such capital stock was so owned or controlled by said Stuart S. Hawley.

II.

The Court finds that neither plaintiff Hawley Investment Company nor Stuart S. Hawley, nor both together, owned directly or controlled through closely affiliated interests or by a nominee or nominees substantially all of the stock of the said plaintiff Alameda Investment Company.

III.

That at all times during the calendar year 1922, said [24] Stuart S. Hawley was also president and general manager and in active management and control of the affairs of the plaintiff Hawley Investment Company and said Stuart S. Hawley owned or controlled all the authorized and outstanding capital stock of said corporation consisting of 2,500 shares of the par value of $100.00 each.

IV.

That during the calendar year 1922, said Stuart S. Hawley was the president and general manager and in active control of the plaintiff Pacific Nash Motor Company, and said Stuart S. Hawley controlled all the authorized and outstanding capital stock of said corporation consisting of 3,500 shares of the par value of $100.00 each.

V.

The Court finds that substantially all the stock of the Pacific Nash Motor Company was owned

throughout the calendar year 1922 by the Hawley Investment Company.

VI.

That it is not true that all or substantially all of the stock of the plaintiff Alameda Investment Company, plaintiff Hawley Investment Company and plaintiff Pacific Nash Motor Company, was owned by the same interests, to wit, said Stuart S. Hawley, and it is not true that plaintiff Alameda Investment Company was affiliated with said corporations during all of the calendar year 1922, as provided by Section 240 of the Revenue Act of 1921, or entitled to file a consolidated return of income or to have its income tax liability computed upon the income of said three corporations plaintiff as a unit.

VII.

The Court finds that the defendant collected said [25] tax from said plaintiff Alameda Investment Company, but it is not true that said collection was made erroneously or illegally in any respect whatsoever. It is not true that the defendant is indebted to said plaintiffs in the sum of $15,087.72, or any other sum.

CONCLUSION OF LAW.

As conclusion of law from the foregoing facts the Court determines that plaintiffs are not entitled to judgment against the defendant herein and that said defendant should recover his costs of suit. Let judgment be entered accordingly.

Dated: July 20, 1928.

BOURQUIN,
United States District Judge.

[Endorsed]: Filed July 24th, 1928. [26]

In the Southern Division of the United States District Court for the Northern District of California.

No. 17,765.

ALAMEDA INVESTMENT COMPANY, a Corporation, HAWLEY INVESTMENT COMPANY, a Corporation, PACIFIC NASH MOTOR COMPANY, a Corporation,
Plaintiffs,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California,
Defendant.

JUDGMENT ON FINDINGS.

This cause having come on regularly for trial on the 1st day of May, 1928, before the Court sitting without a jury, a trial by jury having been waived by written stipulation filed; Dana Latham, Esq., appearing as attorney for plaintiffs, and C. M. Carpenter, Esq., Assistant United States Attorney appearing as attorney for defendant, and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause

having been submitted to the Court for consideration and decision, and the Court, after due deliberation having rendered its decision and filed its findings and ordered that judgment be entered in favor of defendant in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that plaintiffs take nothing by this action; that defendant go hereof without day; and that said defendant do have and recover of and from said plaintiffs his costs herein expended taxed at $23.50.

Judgment entered July 24th, 1928.

WALTER B. MALING,
Clerk. [27]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the first day of May, 1928, the above-entitled cause came on for trial before this Court, Honorable GEORGE M. BOURQUIN presiding, the Court sitting without a jury, trial by jury having been waived in writing by counsel for the respective parties, a true copy of said stipulation being as follows:

"In the District Court of the United States, in and for the Southern Division of the Northern District of California, Second Division.

LAW—No. 17,765.

ALAMEDA INVESTMENT COMPANY, a Corporation, HAWLEY INVESTMENT COMPANY, a Corporation, PACIFIC NASH MOTOR COMPANY, a Corporation,

Plaintiffs,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California,

Defendant.

It is hereby stipulated by and between the parties hereto, through their respective attorneys, Thornton Wilson, Esq., of Oakland, California, and Messrs. Miller, Chevalier & Latham, Los Angeles, California, attorneys for plaintiffs, and George J. Hatfield, Esq., United States Attorney for the Northern District of California, for the defendant, that trial by jury be waived.

THORNTON WILSON,
MILLER, CHEVALIER & LATHAM,
By DANA LATHAM,
Attorneys for Plaintiff. [28]
GEORGE J. HATFIELD,
United States Attorney for the Northern District of California,
Attorney for Defendant.

[Endorsed]: Filed March 29, 1928. Walter B. Maling, Clerk. (Signed) A. C. Aurich, Deputy Clerk."

In the trial, the following proceedings were had and the following testimony given:

Dana Latham, appearing for the plaintiffs, and Messrs. George J. Hatfield, United States Attorney for the Northern District of California, and C. M. Carpenter, Assistant United States Attorney for the same district, appearing for the defendant.

Mr. Dana Latham made an opening statement to the Court on behalf of the plaintiffs and Mr. C. M. Carpenter waived an opening statement in behalf of the defendant, and thereupon the following proceedings were had and evidence and testimony, oral and documentary, were introduced in evidence on behalf of plaintiffs and on behalf of defendant, as follows:

STIPULATION.

The plaintiff offered and read into evidence the following stipulation as to certain facts which had been agreed to by both parties:

The correct operating income and losses for the three parties plaintiff for the year 1922, considered separately, are as follows:

Hawley Investment Company, Loss	$ 36,284.28
Pacific Nash Motor Company, Loss	228,626.42
Alameda Investment Company, Gain	120,701.76
Net operating loss of all three companies combined, assuming they are to be combined	$144,208.94

[29]

The Commissioner of Internal Revenue has accepted the consolidated returns for the calendar year 1922, including the Hawley Investment Company and Pacific Nash Motor Company as affiliated, but has denied the right of Alameda Investment Company to be so included among the affiliated companies.

Throughout the year 1922, Hawley Investment Company owned or controlled substantially all of the stock of Pacific Nash Motor Company.

Throughout the year 1922, Stuart S. Hawley, individually owned or controlled substantially all of the stock of Hawley Investment Company.

Throughout the year 1922, the issued and outstanding stock of H. W. Meek Estate, Inc., was owned as follows:

Harriet W. Meek.....2,499 Shares
Harriet Meek Hawley, wife of Stuart
S. Hawley .....833⅓ Shares
Gladys M. Volkman.....833⅓ Shares
W. H. Meek .....833⅓ Shares
the latter three being children of
Harriet W. Meek,
Stuart S. Hawley.....1 share, Directors qualifying.

Assuming that the contract of December 1, 1920, between the Meek Estate and the Hawley Investment Company to be introduced in evidence does not constitute a sale to Meek Estate of any stock of Alameda Investment Company, and also assuming that the contract was not actually consummated and the stock was not purchased at any time prior to December 31, 1922, it is stipulated that through-

out the year 1922 the stock of Alameda *Investment was* owned as follows:

Hawley Investment Company.....1,638.24 Shares
[30]
Stuart S. Hawley, personally.....200 Shares
C. C. Adams..... 36.76 Shares
H. W. Meek Estate, Inc.....625 Shares

Total.....2,500 Shares

Assuming the Hawley Investment Company to have sold, as a result of this contract of December 1, 1920, six hundred twenty-five additional of its shares of Alameda Investment Company to H. W. Meek Estate, Inc., on December 1, 1920, then the ownership of Alameda Investment Company throughout the year 1922 was as follows:

Hawley Investment Company,.....1,013.24 Shares
Stuart S. Hawley, personally.....200 Shares
C. C. Adams .....36.76 Shares
H. W. Meek Estate, Inc.....1,250 Shares

Total.....2,500 Shares

It is also agreed between the parties that the amount alleged in Paragraph 10 of the complaint herein, of $4,455.42, representing the second installment of income tax in question, should be $4,555.42.

This correction does not change the total amount claimed by plaintiffs.

The plaintiffs thereupon introduced on behalf of the plaintiffs and read into the evidence without objection the deposition of Harriet W. Meek, a witness produced in behalf of plaintiffs, taken before

E. Louvau, a notary public in and for the County of Alameda, State of California, on September 10, 1927, at Hotel Oakland, Oakland, California, pursuant to stipulation duly entered into between the parties, Messrs. Dana Latham and Thornton Wilson appearing for the plaintiffs, and Messrs. C. M. Carpenter, Assistant United States Attorney, and A. George Bouchard, Special Attorney, Bureau of Internal Revenue, appearing for [31] the defendant.

DEPOSITION OF HARRIET W. MEEK, FOR PLAINTIFFS.

HARRIET W. MEEK, called as a witness for the plaintiffs, being first duly sworn, testified as follows:

My name is Harriet W. Meek. I reside at the Hotel Oakland, Oakland, California. I will be 71 years of age next week. I am the widow of Harry W. Meek who died January 21, 1910.

Prior to coming to Hotel Oakland, I lived on the ranch in San Lorenzo, and lived there since 1884.

Prior to the date of my husband's death in 1910, I had separate property which was managed for me by my husband. Prior to the death of my husband in 1910, I had absolutely no experience in business affairs, and all of may affairs had been handled by Mr. Meek.

I have three children: William Harold Meek, Mrs. Stuart Hawley, and Mrs. William Volkman. My son Harold was 25 years old at the death of Mr. Meek, in 1910. At that time he was taking

(Deposition of Harriet W. Meek.)

charge of the ranch and since 1910 he has been the manager of the ranch. He has never resided in Oakland, and to my knowledge has no experience in the making or handling of investments. I do not consider him qualified to handle securities, including bonds, mortgages or real estate, but consider him limited, by qualifications, to the management of the ranch.

Neither one of my daughters, Mrs. Hawley or Mrs. Volkman, have had any business experience. Each of them has children.

I do not know what estate Mr. Meek left on his death, but it was divided between me and the children. [32] Mr. Hawley, my son-in-law, took charge of Mr. Meek's property after his death in 1910.

I do not know whether a corporation called H. W. Meek Estate, Inc., was formed after the death of Mr. Meek. I do not know whether I owned, during the year 1922, any stock in that corporation. I think I was an officer in that corporation, but I do not remember what it was. I was President. I do not know whether I was a Director. I never attended any stockholders' meeting during 1922 or prior thereto. I never attended any Directors' meetings. I never directed any of its business affairs. I never drew a salary from the corporation. Mr. Hawley handled all my affairs since the death of Mr. Meek.

If I owned any stock in H. W. Meek Estate, Inc., during the year 1922 or prior thereto, it was voted

(Deposition of Harriet W. Meek.)

or handled for me by Mr. Hawley. Just prior to the death of my husband in 1910, my husband told me he had perfect confidence in Mr. Hawley and expected him to look after my affairs for me. I desired Mr. Hawley to do this work rather than my son Harold, because my son Harold had had no experience in that direction and was not qualified.

I maintain checking accounts in Oakland banks. I don't think that during 1922 or prior thereto, that I ever drew any checks on my accounts. Mr. Hawley drew all of my checks. He does now and did in 1922 pay all my bills at the Oakland Hotel. I don't know how much money I have in the bank to-day. I never knew during the year 1922. I never gave any instructions to Mr. Hawley as to what he should do with my stock in Meek Estate, Inc., if I owned any.

The offices of Meek Estate, Inc., are located in [33] Mr. Hawley's offices. I think he handled all of the affairs of the Estate through his individual office.

In 1922 I maintained a safety deposit box in the Central Bank of Oakland. Mr. Hawley is the only one who has access to the box besides myself. I do not have to accompany him. I sometimes visit my safety deposit box to draw out anything in the line of jewelry or anything I need. I never visited it during 1922 or prior or subsequent thereto for the purpose of examining my securities. I was interested only in my personal effects.

(Deposition of Harriet W. Meek.)

I presume the H. W. Meek Estate, Inc., was incorporated at Mr. Hawley's suggestion. The property consisted of real estate in San Lorenzo and different places which Mr. Meek left on his death in 1910. I signed a power of attorney authorizing Stuart S. Hawley to handle my affairs.

Thereupon, plaintiffs introduced and read into the evidence, without objection, the original of a power of attorney, bearing date July 1, 1920, signed by Harriet W. Meek, and directed to Stuart S. Hawley, in words and figures as follows:

POWER OF ATTORNEY.

General.

KNOW ALL MEN BY THESE PRESENTS: That I, HARRIET W. MEEK, of the County of Alameda, State of California, have made, constituted and appointed, and by these presents do hereby make, constitute and appoint STUART S. HAWLEY, of the City of Oakland, County of Alameda, State of California, my true and lawful attorney for me and in my name, place and stead, and for my use and benefit to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me; and have, use, and take all lawful ways and means in my name, or otherwise, for the recovery thereof, by legal process, and to compromise and agree for the same, and grant ac-

quittances or other sufficient discharges for the same, and for me, and in my name to make, seal and deliver the same; to bargain, contract, agree for, purchase, receive and [34] take lands, tenements, hereditaments, and accept the seizin and possession of all lands, and all deeds and other assurances in law therefor; and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments, upon such terms and conditions, and under such covenants, as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, merchandise, choses in action, and other property in possession or in action; and to make, do and transact all and every kind of business of what nature and kind soever, and, also, for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment and other debts, and such other instruments in writing, of whatever kind and nature as may be necessary and proper in the premises.

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as I might or could do if I personally present, hereby ratifying

(Deposition of Harriet W. Meek.)

and confirming all that said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this first day of July, A. D. One Thousand Nine Hundred and Twenty.

(Signed) HARRIET W. MEEK. (Seal)

Signed, sealed and delivered in the presence of

_____.

State of California,
County of Alameda,—ss.

On this first day of July, A. D. one thousand nine hundred and twenty, before me, Ada P. Tychsen, a notary public, in and for the said County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared Harriet W. Meek, known to me to be the person described in and whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] (Signed) ADA P. TYCHSEN,
Notary Public, in and for the Said County of Alameda, State of California. [35]

Testimony of HARRIET W. MEEK resumed:

During the year 1922 and subsequent and prior thereto, I never exercised any control over any of the property owned by me. During the year 1922

(Testimony of Stuart S. Hawley.)

Mr. Hawley, the same individual named in the Power of Attorney, handled all of my affairs.

No questions were asked the witness, Harriet W. Meek, on cross-examination.

TESTIMONY OF STUART S. HAWLEY, FOR PLAINTIFFS.

STUART S. HAWLEY, called as a witness on behalf of plaintiffs, being first duly sworn, testified:

My name is Stuart S. Hawley. I reside in Piedmont, California. I am president of Hawley Investment Company, Pacific Nash Motor Company, and Alameda Investment Company, and am vice-president of H. W. Meek Estate, Inc. The offices of these four corporations are located in the Syndicate Building, Oakland, California. The books and records of these four corporations are kept in that office. Besides myself, there was one other common officer for all of these corporations during the year 1922, namely the secretary. I signed all the checks of all four corporations during 1922. The four companies have had these two common officers ever since they were incorporated. The business of each of these companies during the year 1922 was as follows:

Hawley Investment Company is a holding corporation. Meek Estate, Inc., is a holding corporation. Pacific Nash Motor Company is engaged in the buying and selling of automobiles. Alameda

(Testimony of Stuart S. Hawley.)

Investment Company is engaged in the business of owning and buying real estate.

Hawley Investment Company was formed on or [36] about 1906, and constituted a transfer into corporate form of the major portion of the assets of the Hawley family. Alameda Investment Company was formed about 1909 for the purpose of handling real estate. Meek Estate, Inc., was formed about 1910 and represented the major portion of the holdings of the Meek family. Pacific Nash Motor Company was formed in 1907 or 1908 to engage in the automobile business.

These four companies, during the year 1922, had very close business and inter-company relations. The Hawley Investment Company was the guarantor and bailee of all the loans and business ventures of Meek Estate, Inc., and Alameda Investment Company, and had inter-company relations with those corporations. Meek Estate, Inc., acted in somewhat the same manner so far as its interest in Alameda Investment Company was concerned.

I gave a part of my time to each of these four corporations during the year 1922. I drew a salary from all of them during the year 1922.

During the year 1922 I was familiar with the affairs of Meek Estate, Inc., Mrs. Harriet W. Meek, the wife of Harry W. Meek, owned 50% of the stock of the corporation during 1922. It was after the death of Harry W. Meek that the Meek Estate, Inc., which took over his assets, was formed. The remaining one-half of the stock was owned by Mrs.

(Testimony of Stuart S. Hawley.)

Meek's three children: Mrs. Stuart S. Hawley, who is and was during the year 1922, my wife; Mrs. Gladys Volkman, and Mr. W. H. Meek, a son.

During the year 1922, Mrs. Hawley and Mrs. Volkman were housewives, and Mr. W. H. Meek, the son, was the [37] agricultural superintendent of the Meek Estate.

During the year 1922, Mrs. Harriet W. Meek was between 60 and 65 years of age. I was present on September 10, 1927, at the Oakland Hotel, Oakland, California, at which time the deposition of Harriet W. Meek was taken on behalf of plaintiffs for use in this case, and recall the questions and answers concerning my business relations with Mrs. Meek during 1922. The facts contained in that deposition were true and correct.

"Mr. LATHAM.—Q. Did you, as a matter of fact, during the year 1922 and prior and subsequent thereto, control and handle for her all of her business affairs?

A. (Mr. HAWLEY.) I did.

Mr. CARPENATER.—Just a minute. I object to the question and the word 'control' as being something that is described and designated by statute and regulations here. It is a mere conclusion.

The COURT.—It is rather so, but it can be inquired into further.

Mr. LATHAM.—Q. Did you hold, during the year 1922, an absolute power of attorney from Mrs.

(Testimony of Stuart S. Hawley.)

Meek authorizing you to represent here in all matters?

Mr. CARPENTER.—I object to the question on the ground that the power of attorney is the best evidence.

The COURT.—Yes.

Mr. LATHAM.—If your Honor please, the power of attorney is attached to Mrs. Meek's deposition, which has been offered in evidence.

The COURT.—Proceed.

Mr. LATHAM.—Q. What was the occupation of your wife, Mrs. Stuart Hawley, during the year 1922?

A. Housewife. [38]

Q. Did you have any children at that time?

A. We did.

Q. Do you know whether or not Mrs. Hawley had any business experience? A. She did not.

Q. Do you know where her certificate of stock in the Meek Estate was located physically during the year 1922? A. Yes.

Mr. CARPENTER.—Objected to as immaterial.

The COURT.—He may answer briefly. Objection overruled.

Mr. CARPENTER.—Exception.

A. Yes, it was in my safe deposit box.

Mr. LATHAM.—Q. Do you know whether or not she ever had access to that stock certificate?

Mr. CARPENTER.—The same objection.

The COURT.—Overruled.

Mr. CARPENTER.—Exception.

(Testimony of Stuart S. Hawley.)

A. I don't know whether she had a right to go into the safe deposit box, or not, but I know she never has been in there."

Testimony of STUART S. HAWLEY, resumed:

A power of attorney authorizing me to transact all her business affairs has been given me by my wife, Mrs. Hawley. Although I made a diligent search for that power of attorney I have been unable to locate the original document and I believe it has been recorded. During the year 1922 and prior and subsequent thereto, I managed all of the business affairs of Mrs. Hawley. Mrs. Hawley filed a separate income tax return for the year 1922 which I prepared [39] and signed for her as the manager of her affairs.

The income tax return for the year 1922 which I prepared was signed for Mrs. Meek by me as the managed of her affairs.

I do not recall whether a dividend on the stock of Meek Estate, Inc., was declared during the year 1922. If it was I reported that dividend in the returns of Mrs. Hawley and Mrs. Meek.

I voted the stock of Mrs. Hawley and Mrs. Meek in the Meek Estate, Inc., during the year 1922 and prior and subsequent thereto. They have never voted their stock in Meek Estate, Inc. I have always voted their stock.

During the year 1922 the Directors of Meek Estate Inc. were members of the family. I believe Mrs. Meek has been President of the company since

(Testimony of Stuart S. Hawley.)

its formation and Mrs. Hawley also was a director but she never attended meetings.

I was a Director of Meek Estate, Inc., during the year 1922 and held a Director's qualifying share. I dictated all the business policies of Meek Estate, Inc. during 1922.

As President of Hawley Investment Company during 1920 I entered into a contract on behalf of that company with the Meek Estate, Inc., as of December 1, 1920. The document handed me is a contract covering an option to purchase between Hawley Investment Company and H. W. Meek Estate, Inc., dated December 1, 1920, and is the original document.

Plaintiffs thereupon introduced in evidence, without objection, said document, a copy of which is attached hereto as Plaintiffs' Exhibit 1, which reads in words and figures as follows: [40]

PLAINTIFFS' EXHIBIT No. 1.

THIS AGREEMENT, made and entered into between HAWLEY INVESTMENT COMPANY (a corporation) and H. W. MEEK ESTATE, INCORPORATED (a corporation), this 1st day of December, 1920;

WITNESSETH:

WHEREAS Alameda Investment Company, a corporation, has arranged to purchase as of December 1, 1920 all of the assets of the Hayward Investment Company, a corporation, and in payment therefor to issue to Hayward Investment Company Twelve Hundred and Fifty (1250) shares

of the capital stock of the Alameda Investment Company; and

WHEREAS the assets of the Hayward Investment Company are being purchased as of December 1, 1920 at a book valuation of $325, *00*.00; and.

WHEREAS the assets of the Alameda Investment Company as of December 1, 1920 are in the net amount of $325,000.00, represented by a capital account of $250,000.00 and a surplus account of $75,000.00; and

WHEREAS after the purchase of the assets of the Hayward Investment Company by the Alameda Investment Company the Alameda Investment Company will have a capital of $250,000.00, a capital reserve of $250,000.00, and a surplus of $150,000.00; and

WHEREAS the capital stock of the Alameda Investment Company prior to December 1, 1920, is all owned by the Hawley Investment Company and the capital stock of the Hayward Investment Company is owned one-half by the Hawley Investment Company and one-half by H. W. Meek, Estate, Incorporated; and

WHEREAS H. W. MEEK ESTATE, INCORPORATED desired to own one-half of the capital stock of the Alameda Investment Company after the above mentioned consolidation but has not the funds at this time to purchase the said stock but has some securities available and is the owner of a certain note from the Hawley Investment Company to it which is now due; and

WHEREAS it has been agreed between the Haw-

ley Investment Company and said Meek Estate that the said Meek Estate is to have an option from the Hawley Investment Company to purchase the said stock at an agreed price of $260.00 a share, or a total consideration of $162,500.00, provided it will turn over to said Hawley Investment Company the above mentioned note and the securities that it has available at this time with the understanding that said option shall run until December 31, 1922, and if the said option is not exercised that the said Hawley Investment Company will at that time repay to said Meek Estate the moneys and value of securities turned over to it either now or hereafter on account of this option, together with interest on such money and securities at the rate of six per cent; [41]

NOW, THEREFORE, IN CONSIDERATION of the sum of Ten dollars ($10.00) paid to said Hawley Investment Company by said Meek Estate, the receipt whereof is hereby acknowledged, and of the mutual advantages to be obtained by each of the parties hereto, the Hawley Investment Company does hereby give and grant to said Meek Estate the right and option to purchase from it on December 31, 1922, Six Hundred and Twenty-five (625) shares of Alameda Investment Company stock for the total sum of One Hundred and Sixty-two Thousand Five Hundred Dollars ($162,500.00) together with interest on such sum at the rate of six (6) percent per annum.

The terms and conditions of such option are as follows:

1st. The Meek Estate shall pay to said Hawley Investment Company the sum of Fifty-four Thousand Dollars ($54,000.00) on account of such option by offsetting a debt of this amount now due from the Hawley Investment Company to the Meek Estate.

2nd. The Meek Estate shall deliver to the Hawley Investment Company Sixty-two Thousand Two Hundred Dollars ($62,200.00) par value of Consolidated Electric Five Percent First Mortgage Bonds, which shall be accepted by the Hawley Investment Company on account of such option at the rate of $700.00 per bond, or $43,540.00, which shall leave a balance due on the option price of the Alameda Investment Company stock to be paid by the Meek Estate if it shall exercise its option to purchase of the sum of $64,960.00, which sum shall bear interest at six per cent per annum.

3rd. In the event that said Meek Estate shall decide not to exercise this option the Hawley Investment Company obligates itself to return to said Meek Estate on December 31, 1922 in cash the sum of $97, 540.00 which is being paid to it on account of said option price by said Meek Estate, together with interest on said sum at the rate of six (6) percent per annum, but the Meek Estate may not demand the payment of such money by the Hawley Investment Company until the expiration of its option.

4th. In the event that the Meek Estate has additional funds at any time between now and December 31, 1922 which it desires to pay on account of this option, it may turn these over to the Hawley

Investment Company and be credited with said sum so paid and in that event if the Meek Estate does not exercise its option the Hawley Investment Company also obligates itself to repay such moneys so paid over with interest at six percent on December 31, 1922.

5th. If the Meek Estate decides to exercise this option, the remaining unpaid balance on said purchase price shall be paid by it to the Hawley Investment Company on December 31, 1922.

6th. Any dividends declared on the Alameda Investment Co. stock covered by this option shall be turned over to said Meek Estate upon payment thereof, and in the event this option is not exercised the Meek Estate agrees to [42] repay the amount so received to the Hawley Investment Company. If this option is exercised, the dividends so received shall be retained by said Meek Estate as its own property and to offset the payments it has made and may make on account of said option price and the accruing interest on said option price.

7th. It is distinctly understood and agreed that there shall be no obligation on the Meek Estate to exercise this option on account of the fact that it has made or may make during the life of this option financial advances against the purchase price thereof, but that the fact of its having made these advances, the use of which the Hawley Investment Company obtains for two years, is one of the considerations to the Hawley Investment Company for granting this option. And it is further understood and agreed that if the Meek Estate does not exercise

this option, that the Hawley Investment Company shall not be called upon to repay the money so advanced until December 31, 1922. If this option is exercised title to the Six Hundred and Twenty-five (625) shares of Alameda Investment Company stock shall be transferred to the Meek Estate on December 31, 1922 or any time thereafter at its demand. If the option is not exercised the payments advanced herein shall be returned together with interest and the dividends, if any, received by the Meek Estate shall be paid over to the Hawley Investment Company so that the rights of the parties shall be restored as if this option had never existed or been in force and effect.

IN WITNESS WHEREOF the parties hereto, by their respective officers thereunto duly authorized, have caused their corporate names to be signed and their corporate seals to be hereunto affixed the day and year first above written.

HAWLEY INVESTMENT COMPANY.
By STUART S. HAWLEY, (Signed)
President.
By E. H. MAIER, (Signed)
Assistant Secretary.

[Hawley Investment Company Seal]

H. W. MEEK ESTATE, INCORPORATED.
By W. H. MEEK, (Signed)
Vice-president.
By F. W. COOPER, (Signed)
Secretary.

[H. W. Meek Estate Seal] [43]

(Testimony of Stuart S. Hawley.)

Testimony of STUART S. HAWLEY resumed:

I recall the circumstances surrounding the execution of the contract. During the year 1920 we had two investment and real estate companies, the Hayward Investment Company and Alameda Investment Company, each with the same amount of capital and net assets.

Hawley Investment Company and the Meek Estate each owned one-half of Hayward Investment Company, and Alameda Investment Company was owned by Hawley Investment Company. All of these companies had the same personnel and there was constant embarrassment on account of the difference in ownership. As a result, I felt it would be advisable to consolidate these two companies into one corporation. Two major assets of the Alameda Investment Company were of questionable value. Meek Estate, Inc., decided to maintain the same relative ownership in the consolidated company that it would have in the Hayward Investment Company. In a consolidation without change of ownership the consolidated company would be held three-fourths by Hawley Investment Company and one-fourth by Meek Estate, Inc. The Meek Estate, Inc., wished to acquire the second quarter, if the consolidation was made, so that their interest in the new company would be the same as their interest in the old company, the Hayward Investment Company. The financial condition of Meek

(Testimony of Stuart S. Hawley.)

Estate, Inc., was such that it was undesirable to make a large investment in a non-liquid security.

"The COURT.—What is the object of all this?

Mr. LATHAM.—I am showing what was done as to the sale of 25 per cent of stock of Alameda Investment Company to the Meek Estate. [44]

The COURT.—You have a written contract?

Mr. LATHAM.—I want to explain as briefly as possible the circumstances. He is just about through.

The COURT.—How can the circumstances affect the writing if the contract is in writing? However, proceed."

Mr. HAWLEY.—(Resuming.) Meek Estate, Inc., was willing to enter into this consolidation if they were given the option of making this purchase for two years. So, in consideration of a loan of securities by them to Hawley Investment Company, Hawley Investment Company entered into this contract, giving the Meek Estate the option for two years to purchase this second 25 per cent interest in Alameda Investment Company.

Mr. C. C. Adams, a stockholder during the year 1922 in Alameda Investment Company, was a salesman, he never paid anything for this stock.

Mr. LATHAM.—Q. Did he ever vote his stock?

A. I don't know whether he voted it or not. If he did it was under instructions. The stock was always in our possession and never delivered.

Mr. CARPENTER.—I object to that and ask that it be stricken out.

(Testimony of Stuart S. Hawley.)

The COURT.—So far as the answer goes that he never voted the stock, it may stand. Otherwise, it is stricken out.

Mr. LATHAM.—Q. Who, if you know, voted during that year, the stock of Alameda Investment Company owned by Meek Estate?

A. I did.

Mr. CARPENTER.—I object to that question on [45] the ground that the records of Meek Estate, Inc., are the best evidence.

The COURT.—Sustained. Proceed.

Mr. LATHAM.—Q. Do you know who represented the Meek Estate at stockholders' meetings of Alameda Investment Company during 1922, assuming that there were such meetings?

A. I did.

Mr. LATHAM.—Q. Are you able to state, as a matter of fact, Mr. Hawley, who determined the disposition made by Meek Estate of its stock in Alameda Investment Company during the year 1922?

A. There was no disposition of the stock.

Mr. CARPENTER.—I object to that question on the ground that the record is the best evidence.

The COURT.—He says there was no disposition, so that does away with the question.

On cross-examination the witness, STUART S. HAWLEY, testified as follows:

The gross assets of the Meek Estate during the year 1922 were about two million dollars and in 1920 they were about the same.

(Testimony of Stuart S. Hawley.)

The two large assets of the Alameda Investment Company which were of doubtful value were a very large piece of business property in Oakland and one large ranch property in the northern part of the State. By "doubtful value" I mean doubtful when compared to the value carried on the books. The Citrus Farm was one of these assets. The Meek family did not consider the Citrus Farm to be an asset of doubtful value.

Mr. CARPENTER.—Q. Didn't you at any time state that the Meek Estate did not consider the transaction with [46] Hawley Investment Company a profitable one, for the reason that they did not think that the Citrus Farms Company was a profitable venture?

A. I did not state that. I stated that the assets were doubtful; the proportion of actual value as compared to book value was doubtful.

Q. The Meek people felt that way about it?

A. Yes. I did, as manager of the Meek Company."

Thereupon, the witness, STUART S. HAWLEY, was recalled for the plaintiffs, and on behalf of plaintiffs testified as follows:

"Mr. LATHAM.—Q. Mr. Hawley, referring to the contract of December 1, 1920, which you said was an option contract with reference to 625 shares of the stock of Alameda Investment Company, was that option exercised, do you know?

Mr. CARPENTER.—I object on the ground that the books of the company are the best evidence.

(Testimony of Stuart S. Hawley.)

The COURT.—I do not think so. If he knows it as a matter of fact whether the agreement was carried out, he may answer.

Mr. LATHAM.—Q. Was that exercised prior to December 31, 1922, if at all?

A. It was exercised on December 31, 1922.

Q. Between December 1, 1920, and December 31, 1922, was that 625 shares of stock of Alameda Investment Company, if you know, ever delivered to or voted by the Meek Estate?

Mr. CARPENTER.—I object to that question.

The COURT.—Objection is sustained. [47]

Mr. LATHAM.—Q. Mr. Hawley, do you recall the reference in the journal of both Meek Estate and Hawley Investment Company with reference to the contract of December 1, 1920?

A. I do.

Q. Have you any explanation to make relative to these entries?

Mr. CARPENTER.—I object to the question on the ground that the books are the best evidence. It has not been shown that this man kept the books.

The COURT.—They are pretty nearly the best evidence with respect to their contents. What do you mean by 'explain'?

Mr. LATHAM.—If your Honor please, this man is President of these corporations.

The COURT.—What do you mean by an explanation?

Mr. LATHAM.—Q. Do you know whether or not these entries represent facts?

(Testimony of Stuart S. Hawley.)

A. I do not.

Q. Did you ever see these entries on the books?

A. Not to my knowledge.

Q. Did you ever approve these entries as made?

A. I did not.

Q. Did you, as President of Hawley Investment Company, consider that that company was selling 25 per cent of its stock to Meek Estate—25 per cent of Alameda Investment Company stock to Meek Estate on December 1, 1920? A. I did not.

Mr. CARPENTER.—I object to that question on the ground that the record speaks for itself. [48]

The COURT.—The records may speak for themselves but for the sake of the record he may answer. Overruled. If not competent the Court will give it no consideration in arriving at its decision. Proceed, if anything further."

TESTIMONY OF HARRIET MEEK HAWLEY, FOR PLAINTIFFS.

HARRIET MEEK HAWLEY, a witness called on behalf of the plaintiffs, being first duly sworn, testified on direct examination as follows:

I live at Piedmont, California, and am the wife of Stuart S. Hawley and the daughter of Harriet W. Meek. During the year 1922 I was a housewife, living at home.

During the year 1922 I was a stockholder of H. W. Meek Estate, Inc. I do not know how much stock I owned. The certificate was in Mr. Hawley's possession. I think I was a director during the

(Testimony of Harriet Meek Hawley.)

year 1922 in H. W. Meek Estate, Inc. I never attended a directors' or stockholders' meeting during 1922.

I had no other separate property during the year 1922. I have had very little business training. My husband managed my affairs during, prior, and subsequent to the year 1922.

I do not remember ever discussing the affairs of the Meek Estate, Inc. with him. My husband voted my stock in the corporation during 1922.

Mr. LATHAM.—Q. If you recall, did you ever execute an absolute general power of attorney to your husband to handle all of your affairs?

A. I did.

Q. Was that power of attorney, if you recall, in effect during 1922? [49]

Mr. CARPENTER.—I object to the question on the ground that it calls for the conclusion of the witness.

The COURT.—She may answer if she ever revoked.

Mr. LATHAM.—I withdraw the question.

Mr. LATHAM.—Q. Do you recall approximately, when you gave such a power of attorney, if you did?

A. I think it was in the first two years after our marriage."

Testimony of HARRIET MEEK HAWLEY continued:

I gave this power of attorney about seventeen or eighteen years ago. I never revoked the power

of attorney either prior to December 31, 1922, or up to the present time.

No questions on cross-examination were asked the witness.

Thereupon the plaintiffs rested their case.

Thereafter, the defendant introduced certain documentary evidence, without objection, as follows:

(a) A certified copy of a tentative corporate income tax return for 1922 filed by Alameda Investment Company, one of the plaintiffs, which was marked Defendant's Exhibit 2. (Said exhibit is hereby expressly referred to and made a part of this bill of exceptions; and in lieu of engrossing the same herein at length it is agreed that by order of the Court the said exhibit shall be transmitted by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals in connection with any appeal herein, to become a part of the record on appeal with the same effect as if fully set forth at length herein.) [50]

(b) Certified copy of a claim for refund for $15,087.72 income tax for 1922, together with explanatory statement, which was marked Defendant's Exhibit 3. (Said exhibit is hereby expressly referred to and made a part of this bill of exceptions; and in lieu of engrossing the same herein at length it is agreed that by order of the Court the said exhibit shall be transmitted by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals in connection with any appeal herein, to become a part of the record on appeal

with the same effect as if fully set forth at length herein.)

(c) A letter addressed by the Commissioner of Internal Revenue to Hawley Investment Company, dated October 14, 1925, signed by H. B. Robinson, Assistant to the Commissioner, which was marked Defendant's Exhibit 4, reading as follows:

DEFENDANT'S EXHIBIT No. 4.

"TREASURY DEPARTMENT,
Washington.

October 14, 1925.

IT:CR:Af.
OHM.

Hawley Investment Company,
703 Syndicate Bldg.,
Oakland, Calif.

Sirs: Reference is made to a conference held with your representative, Mr. J. Robert Sherrod, of Miller and Chevalier, and to briefs filed relative to the affiliations of your company, the Pacific Nash Motor Company, the Los Molinos Citrus Farms Company and the Alameda Investment Company, during the taxable years 1920, 1921 and 1922. [51]

After a careful consideration of the additional facts and evidence, presented, you are advised that the Hawley Investment Company, the Los Molinos Citrus Farms Company and the Pacific Nash Motor Company were affiliated with each other during the taxable year, 1920, and with the Alameda Investment Company from January 1, 1920 to Novem-

ber 30, 1920, within the purview of Section 240 of the Revenue Acts of 1918 and 1921. A consolidated return should, therefore, have been filed for this year, including the latter company for the eleven-months period specified, and a separate return by the Alameda Investment Company for the month of December.

During the taxable years 1921 and 1922 the Hawley Investment Company and the Pacific Nash Motor Company were affiliated and should have filed a consolidated income and profits tax return for the taxable year 1921. The Alameda Investment Company was not affiliated during these years and should have filed a separate return for each of these years. The consolidated income tax return filed by your corporation for the taxable year 1922 should, therefore, have included only the Pacific Nash Motor Company in addition to your corporation.

In the event that the returns indicated above should be needed in the audit of the case you will be notified by this office.

This ruling supersedes all previous rulings of the Bureau covering the affiliations of these companies for the years 1920, 1921 and 1922.

Respectfully,

C. R. NASH,

Assistant to the Commissioner.

By (Signed) H. B. ROBINSON,

Head of Division. [52]

TESTIMONY OF F. W. COOPER, FOR DEFENDANT.

F. W. COOPER, a witness on behalf of defendant, being first duly sworn, testified on direct examination as follows:

I was subpoenaed with a *subpoena duces tecum* to bring certain books which I have with me. I was Secretary of the Meek Estate, Inc., for the year 1920 and for the year 1922, and during the same period for the other two parties plaintiff. I have with me the minutes of Meek Estate, for the year 1920.

There were not any minutes relative to the so-called option given by the Hawley Investment Company to Meek Estate. There was no meeting held by Meek Estate at that time. No meeting was ever held by Meek Estate, Inc., relative to that transaction.

I have the minutes for Hawley Investment Company. I don't think there were any minutes of that company relative to the option given by Hawley Investment Company to Meek Estate. I don't think Hawley Investment Company had any meeting at that time. There is no reference in the minutes of Alameda Investment Company to the option referred to.

Mr. CARPENTER.—Q. Will you produce the cash-book, Mr. Cooper, for the Meek Estate? You might as well bring the journal and ledger with you

(Testimony of F. W. Cooper.)

for each of the companies. Turn now to the Meek Estate cash-book, if you will, please.

A. The cash-book?

Q. Yes. A. Yes.

Q. Will you point out to us any entry in that cash-book relative to debits or credits concerning the contract of December 1, 1920, between the Hawley Investment [53] Company and the Meek Estate?

A. You mean advances that were made on account of the same?

Q. Either advances or debits.

A. I can get that better from the ledger.

Q. Whichever would be better for you. You might read the item that you have in that ledger now.

A. This is in the ledger. It was the cancellation of a debt of the Hawley Investment Company at that time, $54,000.

Q. What is the date of that?

A. December 1, 1920.

Q. Is that $54,000 even? A. Yes.

Q. What did that represent?

A. That was an advance to the Hawley Investment Company on account of this option.

Q. Well, I do not believe you understand me. Prior to this time there was a note existing for that amount, payable to the Meek Estate by the Hawley Investment Company. Is that correct?

A. Yes.

Q. And part of the purchase price for the shares

(Testimony of F. W. Cooper.)

of stock in the Alameda Investment Company, in which the Hawley Investment Company gave the Meek Estate the so-called option, it was stipulated that the cancellation of that note by the Meek Estate would be part of the purchase price, was it not?

A. No, that was part of the option.

Q. Part of the option? A. Yes.

Q. That is the one that it refers to, is it not?

A. Yes.

Q. And the ledger shows the cancellation of that note in favor of the Hawley Investment Company?

A. Yes, that was part of the consideration.

Q. What is the next item that you have there in the ledger?

A. There is another account here that was opened at the time.

Q. I have in mind some Consolidated Electric bonds, if that will help you any.

A. I know the account. I know it is here. [54] I have an exact duplication of it in the Hawley books.

Q. Refer to the Hawley books.

A. It is an exact duplicate of the Meek Estate books.

Q. Do you know it is an exact duplicate?

A. Yes.

Q. Are you in a position to state that there is an entry in these books showing that the Meek Estate debited itself for the payment of certain consolidated bonds due the Hawley Investment Company as part of the consideration? A. Yes.

(Testimony of F. W. Cooper.)

Q. Will you refer to the Hawley Investment Company books and find that item? There is a journal entry, I understand, under date of December 1, 1920.

A. I guess maybe I can get it from the journal. They are both there, although I cannot find them.

The COURT.—Mr. Witness, if you have to turn at random over a lot of books, we cannot wait for that. What is it you are looking for?

Mr. CARPENTER.—I want to prove by the books that an entry appears in the books of a certain date—I don't know the date—that is why I am so anxious to find it—that the Consolidated Electric bonds were debited. Have you got it?

A. Yes.

Q. Will you read the item?

A. H. W. Meek Estate debited and credit to the Hawley Investment Company $1250 Alameda Investment Company $162,500, and they gave as consideration for said option at said time a cancellation of the Hawley Investment Company note of $54,000, turned over some Consolidated Electric bonds, $42,540, and note of $64,960. That was the open account.

Q. What date is that entry?

A. That is 12/1/1920.

Q. You are testifying now from what book?

A. This is the Hawley journal. [55]

Q. The Hawley Investment Company journal?

A. Yes.

(Testimony of F. W. Cooper.)

Q. Like entries will be found in the Meek Estate books, will they not? A. Yes, just opposite that.

Q. There is one item there mentioned as "Note." What is that note?

A. That was the balance of the option.

Q. The balance of the purchase price, was it not, and the note was a promissory note from the Meek Estate to the Hawley Investment Company, $64,-960? A. That is right.

Q. And carrying 6 per cent interest, and that note was the ordinary promissory note, was it not, in form?

A. There was not a note given on that; we carried it under our note accounts. That is why it says "note."

Q. At whose direction did you carry it that way, as note account?

A. Our inter-company accounts are all carried that way; we never had any notes between one company and another.

Q. You did not draw the note, but you considered it as being due without a note?

A. Yes, we carried it under our notes receivable.

Q. Will you turn to the cash-book of the Hawley Investment Company, showing the payments there were made on account of the last-mentioned note, note being for $64,960?

A. There were payments made from time to time.

Q. I would like to find out when those payments were made.

(Testimony of F. W. Cooper.)

The COURT.—This seems to have been a computed transaction instead of an option.

Mr. CARPENTER.—That is the Government's contention.

Q. I think $12,000 was paid in 1920, if that will help any.

A. There were payments made from time to time. I can run through the cash-book.

Q. To save time, I was wondering if you are sufficiently informed on it to be able to stipulate that $12,960 was paid [56] on the note during the year 1921, and that the balance was paid in the year 1922.

Mr. LATHAM.—I am not informed on these facts; otherwise I would be glad to stipulate.

The COURT.—If you come in here with any books, your books ought to be in a shape that you can advise the Court or counsel. I can't see that it is very material as to specific date. It was all paid before the end of 1922, I assume?

Mr. LATHAM.—It was not, according to our information, your Honor. It went into 1923.

The COURT.—You say the option was executed December 31, 1920. The Court will not sit by while you are trying to locate items in the books. Proceed with the witness.

Mark T. Cole was the bookkeeper in 1920. E. M. Mosier is the wife of H. H. Mosier, who was Treasurer of Pacific Nash Motor Company. Mamie F. Simpson was the wife of C. J. Simpson.

(Testimony of F. W. Cooper.)

The work of Meek Estate was to handle and take care of the assets left by Mr. Meek and to engage in some real estate business. They bought several tracts.

On cross-examination, the witness F. W. COOPER testified as follows:

"Mr. LATHAM.—You did not make these entries in the books, yourself, Mr. Cooper?

A. No, I did not.

Q. Will you turn to the journal of the Meek Estate for December, 1920, and find that note which was referred to by Mr. Carpenter?

The COURT.—Haven't these books any dates, Mr. Witness, so that they can be turned to?

A. Yes.

Mr. LATHAM.—Q. Do you find a note there which Mr. [57] Carpenter referred to?

A. Yes.

Q. Is there any description of that note appearing at the bottom thereof? If so, read it.

A. Option to purchase per agreement.

Q. Is there an exactly similar entry appearing under the same date, if you know, in the books, the journal of the Hawley Investment Company?

A. Yes."

Thereupon the defendant rested and no further evidence was offered or taken, and plaintiffs moved the Court for a judgment on all the issues in their favor and for special findings, and the defendant made the same motion. Whereupon, the case was

taken as submitted after an argument on the motions had been made by each party.

Dated:

DANA LATHAM,
MELVIN D. WILSON,
Attorneys for Plaintiffs.
GEO. J. HATFIELD,
United States Attorney,
For Defendant. [58]

STIPULATION RE APPROVAL OF BILL OF EXCEPTIONS.

It is hereby stipulated and agreed by and between the attorneys for the plaintiffs and defendant, that the foregoing bill of exceptions has been presented in time and that it be approved, allowed and settled by the Judge in the above-entitled court, as correct in all respects, and that the same shall be made a part of the record in said case and be the bill of exceptions therein, and that said bill of exceptions may be used by either parties plaintiff or defendant upon any appeal taken by either parties plaintiff or defendant.

Dated:

DANA LATHAM,
MELVIN D. WILSON,
Attorneys for Plaintiffs.
GEO. J. HATFIELD,
Attorney for Defendant. [59]

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions duly proposed and agreed upon by counsel for the respective parties is correct in all respects and is hereby approved, allowed, and settled and made a part of the record herein, and said bill of exceptions may be used by the parties plaintiff or defendant upon any appeal taken by either parties plaintiff or defendant.

Dated: October 1st, 1928.

BOURQUIN,
United States District Judge.

[Endorsed]: Filed October 2d, 1928. [60]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

NOW COME the plaintiffs in the above-entitled cause and file the following assignment of errors, upon which plaintiffs will rely upon their prosecution of appeal in the above-entitled cause from the decree made by this Honorable Court on the 24th day of July, 1928.

I. That the United States District Court for the Northern District of California, Southern Division, erred in ruling that the control contemplated by Section 240 of the Revenue Act of 1921 is the beneficial interest in corporate stock in question.

II. That the United States District Court for the Northern District of California, Southern Division, erred in that the control contemplated by Section 240 of the Revenue Act of 1921, is not present where: Stuart S. Hawley and his sisters owned all of the stock of Hawley Investment Company; Stuart S. Hawley and Hawley Investment Company owned 75% of the stock of Alameda Investment Company; Hawley Investment Company acted as banker for Alameda Investment Company, endorsed its notes, purchased its notes and contracts receivable; where both companies had the same offices, employees, directors and officers; where the 25% minority stock of Alameda Investment Company was owned by Meek Estate, Inc., all of whose stock was owned by the wife, mother-in-law, and brother-in-law of Stuart S. Hawley; where Stuart S. Hawley held powers of attorney from his wife and mother-in-law who owned two-thirds of the stock of Meek Estate, Inc.; where Stuart S. Hawley attended [61] to all the business of his wife and mother-in-law and voted their Meek Estate, Inc., stock; was the Vice-President of Meek Estate, Inc., and managed its business, and by proxies had voted the stock of Alameda Investment Company for many years.

III. That the United States District Court for the Northern District of California, Southern Division, erred in ruling that the Alameda Investment Company was not affiliated during the year 1922 with the Hawley Investment Company and the Pacific Nash Motor Company.

IV. That the United States District Court for the Northern District of California, Southern Division, erred in ruling that the Commissioner of Internal Revenue did not give permission for the plaintiffs to change their basis of reporting their taxable income for 1922 from the basis of separate returns to consolidated returns.

V. That the United States District Court for the Northern District of California, Southern Division, erred in ruling that plaintiffs were estopped from filing amended consolidated returns for 1922.

VI. That the United States District Court for the Northern District of California, Southern Division, erred in ruling that the payment of tax under protest is a condition precedent to the recovery of said tax.

VII. That the United States District Court for the Northern District of California, Southern Division, erred in ruling that Section 1014 of the Revenue Act of 1924 does not retroactively do away with any necessity for paying taxes under protest as a condition precedent to their recovery.

VIII. That the United States District Court for the [62] Northern District of California, Southern Division, erred in rendering judgment for the defendant as a matter of law.

IX. That the United States District Court for the Northern District of California, Southern Division, erred in denying plaintiffs permission to file proposed findings of fact.

WHEREFORE, the appellants pray that said decree be reversed and that said United States District Court for the Northern District of California, Southern Division, be ordered to enter a decree reversing the decision in said cause.

MILLER, CHEVALIER & LATHAM,
By DANA LATHAM,
Attorneys for Plaintiffs and Appellants.

Service of the within ——— by copy admitted this 13th day of Sept., 1928.

GEORGE J. HATFIELD,
Attorney for Defendant.

[Endorsed]: Filed Oct. 13, 1928. [63]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon reading the petition for appeal of the plaintiffs and appellants, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit, from the decree heretofore filed and entered herein, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal to be filed by plaintiffs be fixed at the sum of $250.00 and the same act as a bond for cost on appeal.

Dated: October 13th, 1928.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed October 13th, 1928. [64]

BOND ON APPEAL.

The Premium Charged for This Bond is $10.00 Dollars Per Premium.

KNOW ALL MEN BY THESE PRESENTS, That we, Alameda Investment Company, a corporation, Hawley Investment Company, a corporation, Pacific Nash Motor Company, a corporation, as principals and Pacific Indemnity Company, a corporation created, organized and existing under and by virtue of the laws of the State of California, as sureties, are held and firmly bound unto John P. McLaughlin, Collector of Internal Revenue for the First District of California, in the full and just sum of two hundred fifty and 00/100 ($250.00) dollars to be paid to the said John P. McLaughlin, Collector of Internal Revenue for the First District of California, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of September, in the year of our Lord one thousand nine hundred and twenty-eight.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said court, between Alameda Investment Company, a corporation, Hawley Investment Company, a Corporation, Pacific Nash Motor Company, a Corporation, Plaintiffs, vs. John P. McLaughlin, Collector of Internal Revenue for the First District of California, defendant, a judgment was rendered against the said plaintiffs and the said plaintiffs, having obtained from said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said John P. McLaughlin, Collector of Internal Revenue for the First District of California, [65] defendant citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Alameda Investment Company, a corporation, Hawley Investment Company, a corporation, Pacific Nash Motor Company, a corporation shall prosecute the appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

HAWLEY INVESTMENT COMPANY.
STUART S. HAWLEY, Pres.
ALAMEDA INVESTMENT COMPANY.
STUART S. HAWLEY, Pres.
PACIFIC NASH MOTOR COMPANY.
STUART S. HAWLEY, Pres.
By F. H. COOPER,
Secretary.
PACIFIC INDEMNITY COMPANY. (Seal)
By S. E. JACKSON,
Attorney-in-fact. (Seal)

State of California,
County of Alameda,—ss.

On this twenty-eighth day of September, in the year one thousand nine hundred and twenty-eight, before me, Ada P. Tychsen, a notary public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared Stuart S. Hawley, known to me to be the president, and F. W. Cooper, known to me to be the secretary, of the corporation, Hawley Investment Company, that executed the within instrument and the officers who [66] executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] ADA P. TYCHSEN,
Notary Public in and for Said County of Alameda, State of California.

On this twenty-eighth day of September, in the year one thousand nine hundred and twenty-eight, before me, Ada P. Tychsen, a notary public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared Stuart S. Hawley, known to me to be the president, and F. W. Cooper, known to me to be the secretary, of the corporation, Alameda Investment Company, that executed the within instrument and the officers who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] ADA P. TYCHSEN,
Notary Public in and for Said County of Alameda, State of California.

On this twenty-eighth day of September, in the year one thousand nine hundred and twenty-eight, before me, Ada P. Tychsen, a notary public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared Stuart S. Hawley, known to me to [67] be the president, and F. W. Cooper, known

to me to be the secretary, of the corporation, Pacific Nash Motor Company, that executed the within instrument and the officers who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] ADA P. TYCHSEN,
Notary Public in and for Said County of Alameda, State of California.

In case of a breach of any condition thereof, this Court may, upon notice to them of not less than ten days, proceed summarily in the action, suit, case or proceeding in which the same was given to ascertain the amount which such sureties are bound to pay on account of such breach, and render judgment therefor against them and award execution therefor.

PACIFIC INDEMNITY COMPANY.
By S. E. JACKSON,
Attorney-in-fact.

State of California,
County of Alameda,—ss.

On this 26th day of September, in the year one thousand and nine hundred and twenty-eight, before me, Mabel J. Turner, a notary public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared S. E. Jackson, known to me to be the duly authorized attorney-in-fact of Pacific Indemnity Company,

and the same person whose name is subscribed to the within instrument as the attorney-in-fact of said company, and the [68] said S. E. Jackson acknowledged to me that he subscribed the name of Pacific Indemnity Company thereto as principal and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MABEL J. TURNER,
Notary Public in and for Alameda County, State of California.

[Endorsed]: Filed October 13th, 1928. [69]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Northern District of California, Southern Division:

Please issue a certified transcript of record in the above-entitled case on appeal to the Circuit Court of Appeals for the Ninth Circuit, consisting of the following:

1. Bill of complaint.
2. Demurrer.
3. Order overruling demurrer.
4. Answer of defendant.
5. Stipulation waiving trial by jury.
6. Special findings on behalf of defendant.

7. Opinion of Court.
8. Judgment-roll.
9. Bill of exceptions on behalf of plaintiffs.
10. Assignment of error.
11. Order allowing appeal, and order fixing cost bond.
12. Cost bond.
13. Citation on appeal.
14. Praecipe.

MILLER, CHEVALIER & LATHAM,
By MELVIN D. WILSON,
Attorneys for Plaintiffs.

Service of the within praecipe by copy admitted this 13th day of October, 1928.

GEO. J. HATFIELD,
Attorney for Defendant.

[Endorsed]: Filed October 13, 1928. [70]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing seventy (70) pages, numbered from 1 to 70, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same

constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $31.10; that the said amount was paid by the plaintiff and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 27th day of December, A. D. 1928.

[Seal] WALTER B. MALING,
Clerk United States District Court, Northern District of California. [71]

CITATION ON APPEAL.

United States of America,—ss.

To JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First Collection District of California, Defendant, and His Attorney, GEORGE J. HATFIELD, United States Attorney for the Northern District of California, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the —— day of October, A. D. 1928, pursuant to an order allowing an appeal filed in the Clerk's office of the District Court of the United States, in and for the Northern District of Cali-

fornia, in that certain cause wherein Alameda Investment Company, Hawley Investment Company, and Pacific Nash Motor Company are plaintiffs, and John P. McLaughlin, Collector of Internal Revenue for the First Collection District of California, is defendant, and you are required to show cause, if any there be, why the order, judgment and decree in the said action mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ————, United States Circuit Judge for the Northern District of California, this 13th day of October, A. D. 1928, and of the Independence of the United States, the one hundred and fifty-third.

FRANK H. RUDKIN,
U. S. District Judge for the Northern District of California. [72]

Service of the within citation by copy admitted this 13th day of Oct., 1928.

GEO. J. HATFIELD,
Attorney for Dft.

[Endorsed]: Citation. Filed Oct. 13, 1928.

[Endorsed]: No. 5689. United States Circuit Court of Appeals for the Ninth Circuit. Alameda Investment Company, a Corporation, Hawley Investment Company, a Corporation, and Pacific Nash Motor Company, a Corporation, Appellants, vs. John P. McLaughlin, Collector of Internal

Revenue for the First District of California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 14, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5689.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1928.

Alameda Investment Company, a corporation,
Hawley Investment Company, a corporation,
Pacific Nash Motor Company, a corporation,

Appellants,

vs.

John P. McLaughlin, Collector of Internal Revenue for the First District of California,

Appellee.

BRIEF FOR APPELLANTS.

DANA LATHAM,
MELVIN D. WILSON,
819 Title Insurance Bldg., Los Angeles, California.
THORNTON WILSON,
Ray Building, Oakland, California.
Attorneys for Appellants.

Of Counsel:
MILLER, CHEVALIER & LATHAM,
819 Title Insurance Bldg., Los Angeles, California.
MILLER & CHEVALIER,
Southern Bldg., Washington, D. C.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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BUREAU OF INTERNAL REVENUE RULINGS.

No. 5689.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1928.

Alameda Investment Company, a corporation,
Hawley Investment Company, a corporation,
Pacific Nash Motor Company, a corporation,

Appellants,

vs.

John P. McLaughlin, Collector of Internal Revenue for the First District of California,

Appellee.

BRIEF FOR APPELLANTS.

Preliminary Statement.

This is an appeal from a decision and judgment of the United States District Court for the Northern District of California, Southern Division, in favor of appellee, in a suit by appellants for the recovery of certain income taxes alleged in the complaint to have been overpaid by appellants for the calendar year 1922.

The issues involved are briefly stated as follows:

(1) Were the appellants affiliated during the calendar year 1922 within the meaning of section 240(c) of the Revenue Act of 1921, and as such subject to tax for that year on their consolidated net income as a business or economic unit?

(2) Assuming the appellants to be so affiliated for the calendar year 1922, are they entitled to have their tax liability computed as a unit even though they originally filed separate income tax returns for said year 1922?

(3) Are appellants entitled to recover the taxes herein sued for in view of the fact that payment was not made under protest, although suit for the recovery thereof was instituted after the enactment of section 1014 of the Revenue Act of 1924?

The District Court decided each of the above issues adversely to appellants.

The Facts.

During the calendar year 1922, the appellant Hawley Investment Company was a corporation organized under the laws of the state of California, with an authorized and outstanding capital stock of 2,500 shares of the par value of $100.00 each. Stuart S. Hawley throughout the year 1922 individually owned or controlled substantially all the outstanding stock of said corporation. [Rec. pp. 1, 13, 24, 30,]

Throughout the calendar year 1922, the appellant Pacific Nash Motor Company was a corporation organized under the laws of the state of California, with an author-

ized and outstanding capital stock consisting of 3,500 shares of the par value of $100.00 each. [Rec. p. 24.]

Throughout the calendar year 1922, the appellant Hawley Investment Company owned or controlled substantially all of the outstanding stock of Pacific Nash Motor Company. [Rec. p. 30.] Throughout said year said Stuart S. Hawley was in active control of the stock and affairs of appellant Pacific Nash Motor Company through his ownership and control of substantially all the outstanding stock of the Hawley Investment Company. [Rec. p. 30.]

Throughout the calendar year 1922, the appellant Alameda Investment Company was a corporation existing under the laws of the state of California, with an authorized and outstanding capital stock consisting of 2500 shares of the par value of $200.00 a share. [Rec. p. 23.]

Throughout the calendar year 1922, 75 per centum of the outstanding stock of appellant Alameda Investment Company was owned by the appellant Hawley Investment Company, substantially all of the outstanding stock of which was owned or controlled by Stuart S. Hawley. [Opinion of the District Court, Rec. p. 21, Findings of Fact, Rec. p. 24.] Throughout the calendar year 1922, the remaining 25 per centum of the stock of appellant Alameda Investment Company was owned by H. W. Meek Estate, Inc. [Opinion of the Court, Rec. p. 21.]

Throughout the calendar year 1922, H. W. Meek Estate, Inc., was a corporation with an authorized and outstanding stock consisting of 5,000 shares. Throughout the calendar year 1922, said issued and outstanding stock of H. W. Meek Estate, Inc., was owned as follows:

Harriet W. Meek, mother-in-law of Stuart S. Hawley, 2,499 shares.

Harriet Meek Hawley, wife of Stuart S. Hawley, and daughter of Harriet W. Meek, 883-1/3 shares.

Gladys M. Volkmann, daughter of Harriet W. Meek, and sister-in-law of Stuart S. Hawley, 833-1/3 shares.

W. H. Meek, son of Harriet W. Meek, and brother-in-law of Stuart S. Hawley, 833-1/3 shares.

Stuart S. Hawley, 1 share.
[Stipulation of Facts, Rec. p. 30.]

Throughout the calendar year 1922, Harriet W. Meek was a widow, aged 65 years, residing at the Hotel Oakland, Oakland, California. [Rec. p. 32.] Mrs. Meek had absolutely no experience in business matters and prior to her husband's death in 1910 all of her affairs were handled by her husband. Subsequent to his death all of her affairs were handled by her son-in-law, Stuart S. Hawley, under an absolute power of attorney, which power of attorney was in effect throughout the calendar year 1922. [Rec. pp. 33, 35.]

Mrs. Meek never attended stockholders', directors', or other meetings of H. W. Meek Estate, Inc. She never drew a salary from the corporation. She was not certain how much stock, if any, she owned in H. W. Meek Estate, Inc. All of her stock in that corporation was voted, during the calendar year 1922, if at all, by Stuart S. Hawley. [Rec. pp. 33, 34.]

Mrs. Meek maintained checking accounts in various banks in Oakland, California, but she never drew on these accounts. All of her bills were paid by Stuart S.

Hawley by check on her accounts. Stuart S. Hawley had access to her safety deposit box throughout the calendar year 1922. [Rec. p. 34.] During the calendar year 1922 and prior and subsequent thereto, Mrs. Meek never exercised any control over any of her property. All of her affairs were handled by Stuart S. Hawley. [Rec. pp. 36, 37.]

Harriet Meek Hawley, during the calendar year 1922, was the wife of Stuart S. Hawley, living at home. She had practically no business training and all of her affairs during, prior, and subsequent to the calendar year 1922 were handled by her husband, Stuart S. Hawley, under an absolute power of attorney which was given about 1910 and which was in effect throughout the year 1922. [Rec. pp. 54, 55.]

Mrs. Hawley never attended a directors' meeting or a stockholders' meeting of H. W. Meek Estate, Inc., during the calendar year 1922. During the calendar year 1922 Stuart S. Hawley voted the stock of Harriet Meek Hawley in the H. W. Meek Estate, Inc. [Rec. p. 55.]

Throughout the calendar year 1922, Stuart S. Hawley was president of appellant Alameda Investment Company, appellant Hawley Investment Company, appellant Pacific Nash Motor Company, and managing vice-president of H. W. Meek Estate, Inc. Stuart S. Hawley gave a part of his time to and drew a salary from each of these corporations. He also signed all the checks for all four corporations. These four corporations also had a common secretary throughout the calendar year 1922. These four corporations all had the same offices in the Syndicate building, Oakland, California, where all their books and records were kept. [Rec. p. 38.]

The appellant Hawley Investment Company was organized about 1906 and acquired the assets of the Hawley family. Alameda Investment Company was formed in 1909 for the purpose of dealing in real estate. Pacific Nash Motor Company was formed in 1908 for the purpose of engaging in the automobile business. H. W. Meek Estate, Inc., was organized about 1910. [Rec. p. 39.]

Throughout the year 1922 and for many years prior thereto, all of the above four corporations maintained very close business and inter-company relations. For example, Hawley Investment Company was the guarantor and bailee for all the loans and business ventures of appellant Alameda Investment Company and for H. W. Meek Estate, Inc. [Rec. p. 39.]

During the calendar year 1922 and for many years prior thereto, Stuart S. Hawley voted the stock of Harriet W. Meek and Harriet Meek Hawley in the H. W. Meek Estate, Inc. and dictated all the business policies of H. W. Meek Estate, Inc. *Throughout the calendar year 1922, Stuart S. Hawley represented H. W. Meek Etate, Inc., at stockholders' meetings of Alameda Investment Company.* [Rec. p. 51.]

For the calendar year 1922, the appellant Alameda Investment Company earned a net profit of $120,701.76; Pacific Nash Motor Company sustained a loss of $228,-676.42; Hawley Investment Company sustained a loss of $36,284.29; or a let loss, assuming all corporations to be consolidated, of $144.208.94. [Stip. of Facts, Rec. p. 29.]

For the calendar year 1922, each of said three appellants without knowledge of their right to file consolidated returns, filed separate income tax returns, the appellant Hawley Investment Company and appellant Pacific Nash Motor Company paying no tax, but the appellant Alameda Investment Company paying a tax to appellee of $15,-087.72. [Complaint, Rec. pp. 5, 6; Answer, Rec. pp. 15, 16.] Thereafter, the appellants, on June 11, 1924, upon learning of their rights filed with the Commissioner of Internal Revenue consolidated income tax returns for the years 1920, 1921, and 1922, and applied to said Commissioner for leave to file said returns. [Complaint, Rec. p. 6, Answer, Rec. p. 17.]

Commissioner of Internal Revenue, granted leave to file and accepted said consolidated returns so filed on June 11, 1924, for the calendar year 1922, with respect to the appellants Hawley Investment Company and Pacific Nash Motor Company, but refused the right of affiliation to the appellant Alameda Investment Company. [Stip. of Facts, Rec. p. 30. Appellee's Exhibit #4, Rec. pp. 57, 58.]

The tax sought to be recovered was paid by the appellant Alameda Investment Company to appellee in installments during March, June, September and December of the year 1923. The complaint in this action was filed July 16, 1927. [Rec. p. 9.] The Revenue Act of 1924, including section 1014 thereof, was enacted and became effective on June 2, 1924.

Appellants filed a claim for refund of the tax so paid on June 11, 1924. [Rec. p. 6, Answer p. 17] On June

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

(2) Section 1014 of the Revenue Act of 1924 provides as follows:

"(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

'Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; *but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.* No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that

time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this act."

Errors Relied Upon.

The errors relied upon by appellants are substantially as follows:

(1) The District Court erred in holding that the "control" referred to in section 240(c) of the Revenue Act of 1921 contemplates a beneficial interest in corporate stock.

(2) The court erred in ruling that the ownership or control contemplated by section 240(c) of the Revenue Act of 1921 is not present for the calendar year 1922 so far as these appellants are concerned under the following circumstances:

(a) Where substantially all the stock of appellant Hawley Investment Company was owned or controlled by Stuart S. Hawley;

(b) Where all of the stock of appellant Pacific Nash Motor Company is owned or controlled by appellant Hawley Investment Company.

(c) Where 75 per centum of the stock of appellant Alameda Investment Company is owned by appellant Hawley Investment Company.

(d) Where the 25 per centum minority stock of appellant Alameda Investment Company was owned by H. W. Meek Estate, Inc., all of whose stock was owned by the mother-in-law, wife, sister-in-law, and brother-in-law of Stuart S. Hawley.

(e) Where Stuart S. Hawley held absolute powers of attorney from his mother-in-law and his wife, who owned two-thirds of the stock of H. W. Meek Estate, Inc., and attended to all their affairs and voted their stock in H. W. Meek Estate, Inc., in addition to being vice-president of said corporation, and voted the stock of appellant Alameda Investment Company owned by H. W. Meek Estate, Inc., all for the calendar year 1922.

(f) Where all four of the above companies had common officers, common offices, and where inter-company relations existed between the various corporations.

(3) That the District Court erred in ruling that the appellants were not affiliated during the calendar year 1922 within the meaning of section 240(c) of the Revenue Act of 1921 and entitled to have their tax liability for that year computed as a unit.

(4) That the District Court erred in ruling that appellants were not entitled to have their tax liability computed as a unit for the calendar year 1922 because of the fact that they originally filed separate income tax returns for that year, despite the fact that such separate returns were filed without knowledge of their right to file consolidated returns.

(5) That the District Court erred in ruling that payment under protest of the tax sought to be recovered

in this case is and was a condition precedent to maintenance of an action for the recovery thereof.

(6) That the District Court erred in rendering judgment for appellee as a matter of law. [Res. pp. 67 to 70.]

ARGUMENT.

I.

The Three Appellants Herein Were Affiliated During the Calendar Year 1922 Within the Meaning of Section 240 (C) of the Revenue Act of 1921.

A. The Question as to Whether or Not Two or More Corporations are Affiliated Within the Meaning of Section 240 (C) of the Revenue Act of 1921 Is a Question of Law and as Such Subject to Review by an Appellate Court.

Section 240(c) of the Revenue Act of 1921 in effect during the calendar year 1922 provides:

> "For the purpose of this section, two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by nominee or nominees substantially all of the stock of another or others; or (2) if substantially all of the stock of two or more corporations is owned or controlled by the same interests."

The finding of the District Court that the appellants herein are not affiliated must necessarily be a conclusion of law as the finding of the court is dependent upon its construction of the various statutes involved. This precise question was passed upon by the Circuit Court of Appeal for the Seventh Circuit in the recent case of the *Great Lakes Hotel Company v. Commissioner of Internal Revenue,* 30 Fed. (2d.) 1. In that case the court said:

"Petitioner accepts the findings made by the Board of Tax Appeals but excepts to the conclusions which the majority of the Board drew from the findings. This conclusion was 'on consideration of all of the facts presented, we are of the opinion that the petitioner was not affiliated with H. L. Stevens & Company or with any of its alleged affiliated corporations during 1920.' Respondent argues this is a finding of fact and inasmuch as the petitioner has not brought up the evidence, it must be accepted by this court as verity.

"While we agree with the respondent that it is immaterial whether a finding of fact appears under the heading 'conclusions of law' we are convinced that the above quotation from the Board's findings of fact and conclusions of law is *in this instance* a conclusion of law—not a finding of fact.

"The specific findings of fact which the Board made show clearly that the quoted statement was nothing more or less than the Board's conclusion drawn from such detailed facts."

B. The Control Contemplated by Section 240 (C) of the Revenue Act of 1921 Is Actual Control and Not Equitable Ownership as Stated by the District Court.

The District Court in its opinion [Rec. p. 21] said in part:

"The object of the statute is taxation in proportion to net income, equality between taxpayers, and to that end to look through the corporate entities to ascertain the real taxpayer, and if the latter substantially owns or controls several corporate enterprises, to tax him only *upon the net income he receives from all.* With this object in mind, it seems clear that *control contemplated by the statute is not mere authority but is beneficial interest.*"

It is submitted that the court failed to grasp the purpose, object and theory upon which the affiliation provisions are based. Section 240 (C) of the Revenue Act of 1921 provides that affiliation may exist when either or both of two conditions exist; ownership or *control* by one corporation of substantially all of the stock of another corporation; or ownership or *control* of substantially all of the stock of two or more corporations by the same interests.

The District Court concluded that control as used in the statute contemplated an equitable interest, in other words, *ownership*. To approve this construction is to read out of the statute altogether the word "control" as the statute specifically employs the word "owned" in addition to the word "control." The use of the words in the statute "owned or controlled" must have contemplated a situation more comprehensive than mere ownership. Had Congress intended ownership legal or equitable as the sole prerequisite to affiliation, the use of the word "control" would have been unnecessary.

That Congress in the use of the word "control" or "controlled" in section 240 (C) intended that those words should be given their commonly and ordinarily accepted meaning becomes clear when the basis for affiliated returns and the consolidation of net income for tax purposes is clearly understood. The provisions relating to consolidated returns first appeared in the Revenue Act of 1918 as section 240 thereof. The provisions of section 240 (b) of the 1918 act defining affiliation are identical with the provisions of section 240 (c) of the 1921 act.

The Senate Finance Committee in its Report No. 617, dated December 6th, 1918, in referring to the proposed provisions of section 240 of the 1918 act, said in part:

> "So far as its immediate effect is concerned, consolidation increases taxation in some cases and reduces it in other cases but *its general and permanent effect is to prevent evasion which cannot be successfully blocked in any other way.* Among affiliated corporations it frequently happens that the accepted intercompany accounting assigns too much income or invested capital to Company 'A' and not enough to Company 'B'. This may make the total tax for the corporation too much or too little. If the former, the company hastens to change its accounting methods; if the latter, there is every inducement to retain the old accounting procedure which benefits the affiliated interests even though such procedure was not originally adopted for the purpose of evading taxation. As a general rule, therefore, improper arrangements, which increase the tax will be discontinued while those which reduce the tax will be retained.
>
> "* * * While the committee is convinced that the consolidated return tends to conserve, not to reduce the revenue, the committee recommends its adoption not primarily because it operates to prevent evasion of taxes or because of its effect upon the revenue but because the *principle of taxing as a business unit what in reality is a business unit is sound and equitable and convenient both to the taxpayer and the government.*"

It seems too clear for argument, therefore, that the affiliation provisions are predicated upon the possibility and probability that the income of one corporation may be shifted to another in such a way that the true net income of each separate company is not reflected.

Since the prime purpose of the situation is to prevent the shifting of income, it must follow that this shifting

of income may occur regardless of by whom or how the stock is actually owned. It may occur if one individual or corporation controls the stock of two or more corporations regardless of whether such individual or corporation owns or has an equitable interest in that stock. It is too well known to require comment that corporate affairs are directed in practically all instances by those who control the stock of the corporation rather than by those who own the stock of such corporation.

It is well known that *unity of action*, which is the result of control, may follow even though ownership equitable or legal is not involved. It is only necessary to recite a few such examples:

(a) *The voting trust.* In this case there is no common ownership but absolute control and we have that *economic unit with the possibility of the shifting of income* which the senate committee specifically referred to.

(b) An express agreement between the stockholders that their stock shall be voted according to a fixed policy.

Affiliation is prescribed by the revenue acts in those cases where the circumstances negative the existence of arm's length transactions between the various corporations comprising the economic unit. This failure to deal at arm's length is certain to exist where any one individual or corporation controls the stock of two or more corporations regardless of whether such individual or corporation has any property interest legal or equitable in said stock.

The very issue herein involved has already been exhaustively presented to the United States Board of Tax Appeals, a tribunal created for the sole purpose of deal-

ing with problems arising under the various internal revenue acts. In the appeal of *Isse Koch & Company*, 1 B. T. A. 624, the Commissioner of Internal Revenue contended that the statute contemplated legal or equitable control akin to ownership. The Board in denying this contention said in part:

> "The word 'control' as defined in Funk & Wagnall's New Standard Dictionary means 'to exercise a direct, a restraining or governing influence.'
>
> "Webster defines 'control' as 'to exercise a restraining or directing influence over, to dominate, hence to hold from action, to curb, subject, overpower'.
>
> "The object sought to be accomplished by Congress in enacting section 240 of the Revenue Act of 1918 was *to tax as a business unit what really was a business unit and to prevent the component parts thereof from evading taxation by means of intercompany transactions.*
>
> "Since Congress intended to require two or more corporations where substantially all their stock is 'owned or controlled by the same interests' to file a consolidated return to prevent them from evading income tax we can see no reason for holding that the 'control' contemplated by the statute means only legal control, *for control not arising or flowing from means legally enforceable may be just as effective in evading taxation as if founded on the most formal and readily enforceable legal instrument.* There is no authority in the section of law referred to or in its context, so far as we can see, for assuming that Congress intended to use the word 'control' in other than its ordinary and accepted sense. On the other hand, we believe that a proper construction of the statute, if it is to serve the purpose for which it was intended, requires us to hold that the 'control' mentioned herein *means actual control regardless of whether or not it is based on legally enforceable means* * * *."

The Board of Tax Appeals has uniformly adhered to the definition of the word "control" as given above. See *Midland Refining Company*, 2 B. T. A. 292; *Badger Talking Machine Company*, 8 B. T. A. 455; *Highland Land Company, Ltd.*, 2 B. T. A. 100; *Stauffer Chemical Company*, 2 B. T. A. 841; *Monroe Furniture Company, Ltd., et al.*, 2 B. T. A. 743; *Tri-County Light & Power Company*, 2 B. T. A. 1165; *Brannum Lumber Company*, 2 B. T. A. 821. In these cases the Board held, *inter alia*, that confidence, unanimity, family relationship, inter-company transactions and the voting of the minority stock by proxy over a long period of years constitutes the control contemplated by the statute.

This problem has also been considered by the courts in a number of cases. In *Great Lakes Hotel Company v. Commissioner* 30 Fed. (2d.) 1, C. C. A. 7th Cir., the court said in part:

> "'Control' as used in the Revenue Act of 1918 in section 240, 40 Stat. 1081, providing that the corporations are deemed affiliated if one owns or controls substantially all the stock of the others; or if substantially all the stock of two or more is owned or controlled by the same interests, *is more comprehensive than 'owned'.*"

It thus seems clear that section 240 (c) provides for affiliation under either or both of two circumstances: (1) actual similarity of ownership; (2) actual control—that is, the operation of business under a single command regardless of equitable or legal ownership of the stock. To define control as meaning equitable ownership as did the District Court is to eliminate the word "control" from the statute and defeat the intent of Congress.

C. Substantially All the Stock of the Three Appellants Herein Was Owned or Controlled by the Same Interests Throughout the Calendar Year 1922, and Said Corporations Were, Therefore, Affiliated During Said Period Within the Meaning of Section 240 (C) of the Revenue Act of 1921.

Throughout the calendar year 1922, substantially all of the stock of appellant Pacific Nash Motor Company was owned or controlled by Appellant Hawley Investment Company. [Stip. of Fact, Rec. p. 30.] It has also been stipulated that during the calendar year 1922, Stuart S. Hawley owned or controlled substantially all of the stock of Hawley Investment Company. [Rec. p. 30.]

It is clear, therefore, that these companies were affiliated during the year 1922 within the meaning of section 240(c) of the Revenue Act of 1921, and the Commissioner of Internal Revenue has so held. [Appellee's Exhibit 4, Rec. p. 57.] Affiliation in this instance exists either through the ownership or control by one corporation of all of the stock of another, or through control of the stock of these corporations *by the same interests, namely, Stuart S. Hawley* and *Hawley Investment Company.*

During said year the Hawley Investment Company owned 75 per centum of the stock of appellant Alameda Investment Company. [Opinion of the Court, Rec. p. 21.] The remaining 25 per centum of the stock of appellant Alameda Investment Company was owned during the calendar year 1922 by H. W. Meek Estate, Inc. Stuart S. Hawley throughout the year 1922 held absolute powers of attorney from the owners of 66-2/3 per

centum of the stock of H. W. Meek Estate, Inc. The owners of the remaining 33-1/3 per centum of the stock of that corporation were the brother-in-law and sister-in-law of the said Stuart S. Hawley, neither of whom had any business experience or took any part in the affairs of the corporation. [Rec. p. 33.] Throughout the calendar year 1922 said Stuart S. Hawley handled the affairs of H. W. Meek Estate, Inc., and represented the H. W. Meek Estate, Inc., at all stockholders' meetings of Alameda Investment Company held during 1922. [Rec. p. 51.]

The problem herein involved may be briefly stated as follows:

Stuart S. Hawley clearly owned or controlled all of the stock of Hawley Investment Company, and through it all of the stock of Pacific Nash Motor Company, and through it all of the stock of the Pacific Nash Motor Company, and through it 75 per centum of the stock of Alameda Investment Company, and through H. W. Meek Estate, Inc., the remaining 25 per centum of the stock of Alameda Investment Company. Under such circumstances, are Alameda Investment Company, Hawley Investment Company, and Pacific Nash Motor Company affiliated within the purview of section 240 (c) of the Revenue Act of 1921? *It is submitted that the answer must be in the affirmative.*

It is clear that Hawley Investment Company and Stuart S. Hawley were and are "closely affiliated interests" within the meaning of section 240(c) of the Revenue Act of 1921. Hawley Investment Company owned 75 per centum of the stock of Alameda Investment Company. Stuart S.

Hawley owned or controlled substantially all of the stock of Hawley Investment Company, and, as the evidence shows, controlled the remaining 25 per centum of the stock of that company owned by H. W. Meek Estate, Inc. It thus appears that 100 per centum of the stock of the Alameda Investment Company is owned or controlled by the same interests which admittedly own or control substantially all the stock of Pacific Nash Motor Company, namely, Hawley Investment Company and Stuart S. Hawley.

In an exactly similar situation the court held that the control required by the statute existed through such closely affiliated interests: *Great Lakes Hotel Company v. Commissioner, supra.*

The evidence of control by Stuart S. Hawley of 100 per centum of the stock of Alameda Investment Company is clear and uncontroverted in any detail. It is conceded that Hawley Investment Company which owned 75 per centum of Alameda Investment Company, was owned or controlled entirely by Stuart S. Hawley, "while the remaining 25 per centum of Alameda Investment Company was owned by H. W. Meek Estate, Inc., and Stuart S. Hawley, president of appellants, manages the H. W. Meek Estate, Inc., by powers of attorney from most of its stockholders." [Opinion of the District Court, Rec. p. 21.] In other words, *actual control by Stuart S. Hawley of the three parties appellant herein is conceded by the trial court.*

It but remains to point out that there here existed that single management which was expressly contemplated by Congress in its enactment of the statute providing for

consolidated returns. Stuart S. Hawley was the president of the three appellant corporations. He was managing vice-president of H. W. Meek Estate, Inc. The president of that corporation was Mrs. Harriet W. Meek, a woman more than 65 years of age during the year 1922, all of whose affairs were handled by Stuart S. Hawley under absolute power of attorney. All of the above corporations also had a common secretary during the year 1922. During that year and prior and subsequent thereto they shared common offices; their books were kept in the same place; and their affairs were practically completely merged. In addition, they had many inter-company transactions. Hawley Investment Company was the guarantor and bailee of the loans and business ventures of Alameda Investment Company and H. W. Meek Estate, Inc.

It would indeed be difficult to find a case in which more complete control, together with ownership, was exercised over a group of business enterprises by one individual, namely, Stuart S. Hawley. *Quite clearly there existed here a complete business or economic unit under a single command,* with all the attendant possibilities of shifting of income which Congress desired to avoid.

In a word, the Hawley family owned Hawley Investment Company, Pacific Nash Motor Company, and 75 per centum of Alameda Investment Company. The H. W. Meek Estate, Inc., which owned the remaining 25 per centum of Alameda Investment Company, was owned one-half by Stuart S. Hawley's mother-in-law one-sixth by his wife, one-sixth by his sister-in-law, and one-sixth by his brother-in-law. *Stuart S. Hawley dominated all of them.*

The problems herein involved have been passed upon by the United State Board of Tax Appeals and by the courts in many similar cases.

(a) In *Ullman Manufacturing Company v. United States*, decided February 4, 1929, by the Court of Claims, reported in Reports of Commerce Clearing House, Federal Court Service for 1929, page 6577, the court held two corporations affiliated under similar circumstances, and in addition that control does not necessarily mean ownership.

(b) In *Appeal of Century Music Publishing Company v. Commissioner*, 12 B. T. A. 647, it appeared that three companies were dominated by one individual. The Board held the three companies affiliated, saying: "In all the thirty years existence of these three corporations, they have been completely dominated, managed, and financed by Leo Feist. * * * In all these thirty years there has been no diverse or antagonistic interests. The business was conducted as an economic and business unit, and the interests of all were exactly the same."

(c) In the *Appeal of Tri-County Light and Power Company v. Commissioner*, 2 B. T. A. 1165, the Board of Tax Appeals held two corporations affiliated where the husband voted all the stock owned by various members of the family. The situation in that case is strikingly similar to that involved in the instant appeal.

(d) In the *Appeal of Brannum Lumber Company v. Commissioner*, 2 B. T. A. 821, the Board of Tax Appeals held two corporations to be affiliated where a son owned a minority of the stock in one company and his parents owned the majority of the stock in that company and all of the stock in the other company, the son being the manager of both corporations.

It is submitted that the facts in this case clearly demonstrate the existence of an actual, positive, and

dominating control by Stuart S. Hawley through himself or through closely affiliated interests, including Hawley Investment Company, and H. W. Meek Estate, Inc., of substantially all of the stock of the three appellant corporations herein involved. It must follow, therefore, that these three companies were affiliated during the calendar year 1922, and as such entitled to file affiliated returns.

II.

The Fact That Appellants Originally Filed Separate Income Tax Returns for the Calendar Year 1922 Without Knowledge of the Fact That a Consolidated Return Was Proper Does Not Destroy their Right to Have Their Tax Liability Determined as a Consolidated Group.

In this connection the District Court stated in its opinion:

> "In 1922 the corporations plaintiff elected to make separate returns and have no right to recover taxes paid on that basis. It may be that in 1924 the Commissioner could have permitted an amendment to consolidate the 1922 returns. If so the power is discretionary only." [Rec. p. 22.]

Section 240(a) of the Revenue Act of 1921 provides in part as follows:

> "That corporations which are affiliated within the meaning of this section may for any taxable year beginning on or after January 1, 1922, make separate returns, or under regulations prescribed by the Commissioner with the approval of the secretary make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such basis all

returns thereafter made shall be upon the same basis unless permission to change is granted by the Commissioner."

A. THE APPELLANTS CANNOT BE SAID TO HAVE MADE A BINDING ELECTION WHEN THEY HAD NO KNOWLEDGE OF THEIR RIGHT TO FILE CONSOLIDATED RETURNS FOR THE CALENDAR YEAR 1922.

The original separate returns for the year 1922 were filed by appellants "without knowledge that they were entitled to file a consolidated return of income." [Complaint Rec. p. 5.] The appellee, by failure to refer in any way to this positive allegation in his answer must be considered as having admitted the truth thereof. Section 462 of the Code of Civil Procedure of California provides:

> "Every material allegation of the complaint not controverted by the answer must for the purpose of the answer be taken as true. * * *"

It is too well settled to require citation of authorities that the Federal Courts follow the rules of practice, procedure, and pleading adopted by the states.

An election to be binding implies a knowledge of one's rights. The rule is thus stated in 20 Corpus Juris 19, 35:

> "It may be stated as a general rule that any decisive act of a petitioner *with knowledge of his rights,* and of the facts indicating intent to pursue one remedy rather than the other, determines his election in case of conflicting and inconsistent remedies. To the proper application of this rule at least three things are essential: (1) There must be in fact two or more co-existing remedies between which the party has the right to elect; (2) The remedies thus open to him must be inconsistent; (3) He must, by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between these two inconsistent remedies.

"A binding election, however, cannot be made where the party is in ignorance of the remedies.

"An election between two *remedies necessarily implies knowledge that there are two remedies,* * * * and an election made by a party under a mistake of facts, or a misconception of his rights is not binding in equity, and this is true whether the mistake is one of law or one of fact. * * *" *(Standard Oil Co. v. Hawkins,* 74 Fed. 395. *Graybill v. Corlett,* 60 Colo. 551; 154 Pac. 730.)

B. THE ELECTION PROVIDED BY SECTION 240(a) OF THE REVENUE ACT OF 1921, ASSUMING ONE IS SO PRESCRIBED, APPLIES ONLY TO YEARS SUBSEQUENT TO 1922, AND DOES NOT PROVIDE THAT RETURNS ON A BASIS DIFFERENT FROM THE ORIGINAL RETURNS MAY NOT BE FILED FOR THE YEAR 1922.

Section 240(a) in this connection states:

"If return is made on either of such bases (separate or consolidated) *all returns thereafter made shall be upon the same basis* unless permission to change the basis is granted by the Commissioner."

It was clearly the intent of Congress to require the taxpayer or taxpayers to decide for the calendar year 1922 whether or not they desired to file separate or consolidated returns, and, when the decision had been made with knowledge of the facts, to file the same type of return for the year 1923 and subsequent years. The reason for this requirement is obvious. By filing separate returns for one year and consolidated returns for the ensuing year, it would be possible to so shift income that the prime purpose for consolidated returns would be forever lost.

Such a situation, however, does not exist where the taxpayer desires only to change from the separate to the

consolidated basis for the year 1922 and does not intend to change its basis for 1923 and subsequent years. To so construe the statute clearly carries out the intent of Congress. A final decision must be made with regard to the year 1922. The statute does not say that the basis for 1922 shall not be changed but only that the basis adopted for 1922 must be followed in subsequent years. Subsequent returns must contemplate returns for subsequent years and not amended returns for the same year.

In fact, any other construction of the statute in reality defeats the intent of Congress, which was to give the taxpayer its option for the year 1922, and require the taxpayer to be consistent during all ensuing years. In effect, Congress intended that if any benefits were to be derived from consolidated returns for the calender year 1922, that the taxpayer should assume any burdens incident thereto in ensuing years. It was quite clearly intended, however, that the taxpayer should have the choice as to whether or not it would assume this risk. *The construction of the lower court deprives the taxpayer forever of the opportunity to make this choice.*

C. Assuming without conceding that the permission of the Commissioner must be obtained in order for the affiliated returns to be acceptable, the Commissioner in this case has given permission for appellants to change their basis provided there exists the ownership or control contemplated by section 240(c) of the Revenue Act of 1921.

On June 11, 1924, when appellants learned of their right to file consolidated returns for 1922, such returns were filed, and thereafter were duly audited by the Com-

missioner. On October 14, 1925, prior to the institution of this suit the Commissioner, through his duly authorized agent, addressed the appellant, Hawley Investment Company, with reference to the amended consolidated returns filed on June 11, 1924, not only for the year 1922 but also for the years 1920 and 1921. In this letter the Commissioner states in part as follows:

> "During the taxable years 1921 and 1922, Hawley Investment Company and Pacific Nash Motor Company were affiliated and should have filed a consolidated income and profits tax return for the taxable year 1921. Alameda Investment Company was not affiliated during these years and should have filed a separate return for each of these years. The consolidated income tax return filed by your corporation for the taxable year 1922 should, therefore, have included only Pacific Nash Motor Company in addition to your (Hawley Investment Company) corporation.
>
> "In the event that the returns indicated above should be needed in the audit of the case, you will be notified by this office.
>
> "This ruling *supersedes all previous rulings of the Bureau of Internal Revenue covering affiliation of these companies for the years 1920, 1921 and 1922.*"
>
> [Appellee's Exhibit 4, Rec. p. 58.]

The above letter can only be construed as an acceptance of the affiliated return filed June 11, 1924 for the year 1922, insofar as the Commissioner deemed that said companies fell within the provisions of section 240(c). The Commissioner's letter constitutes permission to all companies *actually* affiliated to file affiliated returns for the year 1922, as the returns accepted by the Commissioner

for Hawley Investment Company and Pacific Nash Motor Company were affiliated returns.

By the same token, it must follow that the Commissioner, if he gives permission to any members of an affiliated group to file affiliated returns, must be deemed to have given such permission to all of the members of that group. *To hold otherwise would vest the Commissioner with the arbitrary power to affiliate those companies with the losses as was the case with Hawley Investment Company and Pacific Nash Motor Company, and require a separate return for the company or companies with the profits.*

The Commissioner himself in the rulings issued by his Department has recognized and followed these propositions. Income Tax Ruling No. 2084, reported in Cumulative Bulletin III-2, p. 356, states the rule as follows:

> "An affiliation ruling letter from the Income Tax Unit advising the taxpayer that various corporations are to be included in a consolidated return *is held to be a special permission within the meaning of the 1921 Act.* Special Permission means permission given in a particular case. A ruling requiring that consolidated returns be filed *or holding that certain corporations are affiliated* and that a consolidated return may be filed *is permission to file such a return within the meaning of the statute.*"

The Solicitor of Internal Revenue, attorney for the Commissioner of Internal Revenue, has uniformly followed the construction herein contended for. In Solicitor's Memorandum No. 2683, reported in Cumulative Bulletin IV-1, p. 238, the Solicitor stated:

"Can the agent of a group of organizations which are affiliated within the meaning of section 240(b) of the Revenue Act of 1921 elect to file a consolidated return for part of the group and individual returns for the balance, or must the entire group be either consolidated or file separate returns? * * * The language of section 240(a) is specific. * * * This language can mean but one thing: that the group as a whole may render individual corporate returns or that the group as a whole may render a consolidated return. This office is therefore of the opinion that where a group of corporations are affiliated within the meaning of section 240(c) of the Revenue Act of 1921, they must for any taxable year beginning on or after January 1, 1922, either elect to file one consolidated return for the entire group or file individual returns for each corporation.

"Where this election is made it will be binding on all future years unless permission is secured from the Commissioner to change the basis before the due date of filing of the return."

If the provision above outlined is binding on the taxpayer then it must be equally binding on the Commissioner.

The conclusion is inescapable that the Commissioner, by his letter of October 14, 1925, intended to grant special permission and did grant special permission to file a consolidated return to all companies falling within the consolidated group. It is only necessary, therefore, in this case to show that Alameda Investment Company is affiliated with the other two companies as defined by section 240(c) of the Revenue Act of 1921.

III.

In This Case Payment Under Protest Is Not a Condition Precedent to the Recovery of a Tax Erroneously Paid.

A. REGARDLESS OF THE ENACTMENT OF SECTION 1014 OF THE REVENUE ACT OF 1924, PAYMENT UNDER PROTEST IS NOT A PRE-REQUISITE FOR THE RECOVERY OF AN INTERNAL REVENUE TAX ERRONEOUSLY PAID.

There is no provision in any income tax act which requires that the tax be paid under protest as a condition precedent to its recovery. Section 252 of the Revenue Act of 1921 provides in part as follows:

> "If upon examination of any return of income made pursuant to this act * * *, it appears that an amount of income, war profits, or excess profits tax has been paid in excess of that properly due, then notwithstanding the provisions of section 3228 of the revised statutes, the amount of the excess shall be credited against any income, war profits, or excess profits, or installments thereof, then due from the taxpayer under any other return, and *any balance of such excess shall be immediately refunded to the taxpayer.*"

In *Greenport Basin & Construction Company v. United States*, 269 Fed. 58, the District Court for the Eastern Division of New York held that payment under protest was not a condition precedent to recovery of tax paid under the Revenue Act of 1918, and cited in support of its decision the provisions of section 252 of the Revenue Act of 1918, which are exactly similar to those of the same numbered section of the 1921 Act quoted above.

While the suit in question was against the United States the language is equally applicable to a suit against a collector.

The District Court for the District of Connecticut reached the same conclusion in the case of *Capewell Horse Nail Company v. Walsh*, 1 Fed. (2d) 818. In that case the court said in part:

> "It appears that under the specific provisions of the Act, the plaintiff is entitled to a refund whenever it appears on examination of the return that the amount of tax paid is in excess of that properly due. * * * Under the circumstances, the money is properly recoverable when paid, wholly irrespective of the existence or non-existence of protest at the time of payment. The Act of Congress does not provide for the making of any protest as a condition precedent to the right of recovery. * * *."

See, also,

United States v. Hoslef, 237 U. S. 1.

B. Assuming But Not Conceding That Prior to June 2, 1924, Payment Under Protest Was a Prerequisite to the Recovery of a Tax, the Provisions of Section 1014 of the Revenue Act of 1924 Eliminated This Requirement In All Cases Similar to the One at Bar Where Suit was Instituted After the Effective Date of That Act.

Section 1014 of the Revenue Act of 1924, enacted June 2, 1924, provides in part as follows:

> (a) " * * * Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> (b) This section *shall not affect any proceeding in court instituted prior to the enactment of this act.*"

There is no provision in the statute that this provision of law shall apply only in cases where the tax in question was paid after June 2, 1924.

The legislative history of section 1014(a) of the 1924 Revenue Act is pertinent. The report of the Committee on Ways and Means, dated February 11, 1924, in commenting on the proposed section 1014(a) of the 1924 Act, said:

> "The provisions of section 1318 of the existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums or penalties paid, that such amounts shall have been paid under protest or duress. *The fact that protest was made has little bearing on the question of whether the tax was properly or erroneously assessed.* The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirements of it may operate to deny full credit to a taxpayer who is not well informed."

The above language indicates clearly that Congress was not interested in the technical requirements of a protest but was interested only in whether or not the taxes paid were in fact excessive, illegal, or erroneous. The language also clearly shows that the amendment was intended to apply to taxes already paid, the only limitation being, as is set forth in the statute itself, *that the provisions of the statute shall not affect suits already instituted. The suit in this case was filed July 16, 1927.* It would seem entirely clear, therefore, that it is immaterial that the tax herein sued for was not paid under protest.

The District Court in its opinion in this case refers to the case of *Smietanka v. Indiana Steel Company,* 257 U. S. 1, as requiring protest. It is submitted, however, that the only principle established by that case is that a taxpayer may not sue the successor in office of a col-

lector of internal revenue for a tax paid the defendant's predecessor.

The District Court stressed the proposition that the appellee might be personally liable for this judgment and the appellee had acted without fault. This technical argument is not persuasive. It is too well known to require comment that in all cases where judgments are entered against collectors of internal revenue, certificates of probable cause are issued by the court and the amount of the judgment is promptly paid out of the treasury of the United States. The situation is exactly the same as if the judgment were against the United States. Section 1315, Revenue Act of 1921. To rely upon an apparent technical individual liability of a collector is to invoke time-worn and out-of-date principles and to defeat justice in order to carry out an admittedly useless formality.

A number of courts have already passed upon the express problem herein involved. In *Warner v. Walsh*, 24 Fed. (2d) 449 the facts were identical with those involved herein. The court in holding that no protest was necessary where suit was instituted subsequent to June 2, 1924, said:

> "I am of the opinion that this language (section 1014(a) of the 1924 Act) changes the rule heretofore prevailing, and an action may now be maintained against a collector for the recovery of income tax erroneously paid regardless of protest."

See also *Weir v. McGrath* decided by the United States District Court for the Southern District of Ohio, May 21, 1928, and reported in American Federal Tax Reports, volume 6, page 8005, otherwise unreported. In that case the court said:

"But it is objected that suits against collectors of internal revenue are personal and that payments made prior to the amendment of June 2, 1924, without protest created a vested right to a then existing defense on the part of the collector which could not thereafter be defeated by legislation.

"* * * But we do not think that such actions are to be considered as so far personal to the collector of internal revenue, individually, that Congress is prevented from providing any reasonable system, by suit against the collector or otherwise, for re-payment to the taxpayer of taxes illegally or erroneously collected even though such taxes were paid without formal protest. * * * *The amendment of 1924 obviously had reference and application to payments already made and suits founded thereon as well as to payments to be made.* * * .*"

It is submitted, therefore, that payment under protest is not a prerequisite to the maintenance of this suit.

Conclusion.

I.

The three appellants were affiliated during the calendar year 1922 within the meaning of section 240(c) of the Revenue Act of 1921.

(a) Hawley Investment Company owned all of the stock of Pacific Nash Motor Company.

(b) Hawley Investment Company owned 75 per centum of the stock of Alameda Investment Company.

(c) The remaining 25 per centum of the stock of Alameda Investment Company was owned by H. W. Meek Estate, Inc.

(d) The stock of Alameda Investment Company owned by H. W. Meek Estate, Inc. was controlled and voted by Stuart S. Hawley.

(e) Stuart S. Hawley owned or controlled all the stock of Hawley Investment Company.

(f) "Control" as used in section 240(c) 1921 Revenue Act means actual control and not equitable ownership.

(g) The three appellants were affiliated during the calendar year 1922 because substantially all their stock was owned or controlled by the same interests.

II.

The fact that the appellants originally filed separate income tax returns without knowledge of their legal rights is immaterial.

(a) No person can make a binding election without full knowledge of his rights in the premises.

(b) The election provided by section 240(a) of the Revenue Act of 1921 applies only to years subsequent to 1922.

(c) The Commissioner of Internal Revenue, as a matter of fact, gave special permission to all companies *properly* within the consolidated group to file consolidated returns for the year 1922.

III.

It is immaterial that the tax herein sought to be recovered was not paid under protest.

(a) Protest is not a prerequisite to the maintenance of a suit for the recovery of a tax illegally collected.

(b) Even if protest were necessary this requirement was specifically eliminated by section 1014 of the Revenue Act of 1924.

It is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

DANA LATHAM,
MELVIN D. WILSON,
THORNTON WILSON,
Counsel for Appellants.

MILLER & CHEVALIER
Of Counsel.

No. 5689

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ALAMEDA INVESTMENT COMPANY, a corporation, et al.,
Appellant,

vs.

JOHN P. McLAUGHLIN, etc.
Appellee.

BRIEF FOR APPELLEE

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No. 5

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

ALAMEDA INVESTMENT COMPANY, a corporation, et al.,
Appellant,

vs.

JOHN P. McLAUGHLIN, etc.
Appellee.

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

Appellants' main contentions I and II present the simple question whether, upon the undisputed facts, the three corporations, (1) Hawley Investment Company, (2) Pacific Nash Motor Company, and (3) Alameda Investment Company, were "affiliated" corporations within the meaning of § 240(c) of Revenue Act of 1921 (42 Stat. 227, 260), with a consequent right to make a "consolidated return" of net income for the calendar year 1922, which would yield $15,087.72 less tax than

separate returns, the amount for which suit is brought.

They were not "affiliated." For a clear exposition of the history and purpose of the legislation, we refer to Appeal of Gould Coupler Co., 5 B.T.A. 499, 514-516; and upon the facts in the record here we adopt the reasoning of the District Court, 28 F.(2d) 81, as adopted and amplified on February 4, 1929, by the Circuit Court of Appeals, Second Circuit, in Commissioner v. Adolph Hirsch & Co., 30 F.(2d) 645. Both of those opinions are concise, clear, and easily accessible, and no useful purpose would be served by reprinting them here. Their reasoning is satisfactory and convincing, and we are not able to add to it. That the facts here are within the holding in the Second Circuit, supra, is plain from the following table of stockholders and their respective percentages of ownership in the three corporations (T. 30-31):

	(1) Hawley	(2) Paeifie	(3) Alameda
Stuart S. Hawley	100	.....	8
Hawley Corporation	.....	100	65.5
C. C. Adams	.....	.....	1.5
Meek Estate, Inc.	.....	.....	25

Or, if we consider the last item of 25% as owned individually by the stockholders of Meek Estate, Inc., we reach the following result:

	(1) Hawley	(2) Paeifie	(3) Alameda
Stuart S. Hawley	100	.....	8
Hawley Corporation	.....	100	65.5
C. C. Adams	.....	.....	1.5
Harriet Meek	.....	.....	12.5
Harriet Hawley	.....	.....	4.1
Gladys Volkman	.....	.....	4.2
W. H. Meek	.....	.....	4.2

Again, if we consider as one the Hawley and Pacific corporations and Stuart S. Hawley, we reach the following result:

	(1) Hawley	(2) Pacific	(3) Alameda
Stuart S. Hawley	100	100	73.5
C. C. Adams	.....	.....	1.5
Harriet Meek	.....	.....	12.5
Harriet Hawley	.....	.....	4.1
Gladys Volkman	.....	.....	4.2
W. H. Meek	.....	.....	4.2

During the calendar year 1922, the Hawley and Pacific corporations suffered, respectively, net losses of $36,284.28 and $228,626.42, and the Alameda had a net income of $120,701.76; and the simple fact is that five persons (Adams, the two Meeks, Volkman and Harriet Hawley), having 26.5% of the stock ownership of the profitable corporation, *have no interest whatever* in the two losing corporations.

There is no inconsistency between the authorities cited by us, supra, and the one, Great Lakes Hotel Co. v. Commissioner, 30 F.(2d) 1 (CCA-7), cited by appellants, as it merely applied the statutory principle of taxing as a business unit *what really was a business unit;* that was simply a case of a parent corporation operating through a chain of subsidiary corporations, and the court pointed out, 30 F.(2d), at 3, col. 1, that "all parties seemed to agree that the * * equitable title" to the stock of *all* corporations "rested in the individuals of the Stevens organization;" i. e., the *same* individuals equitably owned *all* the stock. That meets the Second Circuit test of (1) the *same* stockholders, with equitable ownership in *all* the corporations, (2) in

the same *proportion* in each. If the seven cases cited by appellants at their page 21 from the reports of the Board of Tax Appeals be assumed to be correctly decided (the correctness of which assumption we do not pause to consider), at most their effect is no more than to lay down the qualification: "in *approximately* the same *proportion* in each." Here, five persons were stockholders in only *one* of the corporations, and had *neither legal nor equitable ownership* or interest whatever in the two others.

We turn to appellants' final contention III, which takes the question-begging form, "In this case payment *under protest* is not a condition precedent to the recovery of a tax erroneously paid." We do not contend, nor under R. S. § 3226, as amended, could we contend, that there is any longer a requirement of payment under *protest* or *duress* as a condition precedent to recovery back. The form of statement of contention by the appellants misses the point, which is that there can be no right to cast in a *personal* judgment a collector of the revenue who is without fault or wrong in the premises; certainly (if we *assume* that the Congress has such a power) such a result is not to be considered in the absence of express words in the statute, and there are none. The action here is *personal* against the revenue collector, Smietanka v. Indiana Steel Co., 257 U.S. 1, and is indebitatus assumpsit for money received, in which a plaintiff must show *equity and good conscience* on his side:

> "The action of assumpsit for money had and received, it is said by Ld. Mansfield, Burr., 1012,

> Moses v. Macfarlen, will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in Stratton v. Rastall, 2 T. R., 370, 'that this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex equo et bono,* or it can never be."
>
> Cary v. Curtis, 3 How. 235, 246.

"*As between the parties to the action*" here, there is nothing to raise a *personal* equity against the collector. It would be violative of the simplest notions of equity, and it would be against conscience, to cast a collector in a *personal* judgment upon the facts here. Here, appellants *voluntarily* paid the tax, without the slightest warning to the collector. By the common law and by all the books, a voluntary payment was not recoverable; an *involuntary* payment was, upon a showing of payment under (1) protest, (2) duress, or (3) "notice of intention to bring suit to test the validity of the claim." An intention of the Congress to change the centuries-old law concerning voluntary payments cannot be fairly read in or into this statute. The statute did not create a new right of action; it simply removed a clog (or, perhaps, only two of the three clogs, supra) from an old one:

"An appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."

Philadelphia v. Collector, 72 U. S. 720, 731;

"The rule is firmly established that taxes voluntarily paid cannot be recovered back, and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment."

Chesebrough v. U. S., 192 U. S. 253, 259;

"The principle that a tax or an assessment voluntarily paid cannot be recovered back is an ancient one in the common law and is of general application. See Cooley on Taxation, vol. 2 (3d Ed.), p. 1495."

Fox v. Edwards, 287 Fed. 669 (CCA-2).

We have said, supra, that "the statute did not create a new right of action;" certainly, it created no new right of action *against an innocent collector,* whatever the effect may have been to create a new right of action *against the United States,* under the Tucker Act, 28 U. S. C. § 41 (20) on a "claim not exceeding $10,000 founded upon a law of Congress," of which the District Courts have jurisdiction concurrent with the Court of Claims, U. S. v. Emery, 237 U.S. 28, and of which, since November 23, 1921, (42 Stat. 311) the district courts have jurisdiction concurrent with the Court of Claims "even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

The "equity and good conscience" of an indebitatus assumpsit at the common law against a collector of the revenue *personally* arose upon, and solely and only upon, the existence of one or more of three *facts*: (1) protest, (2) duress, (3) notice of intention to bring suit. Whether a suit may now be maintained against the United States under the Tucker Act in the absence of protest or duress, but in the presence of the notice, we need not stop to consider, as the suit at bar is not brought directly against the United States under the Tucker Act. None of the three facts, supra, being present here, there is no right to maintain the suit against the collector personally, even though we should assume for the argument that the three corporations were

"affiliated" within the meaning of the statute and in consequence entitled to make a consolidated return.

The judgment should be affirmed.

Respectfully submitted,

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United States Attorney,

GEORGE M. NAUS,
Asst. United States Attorney,
Attorneys for Appellee.

No. 5689.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alameda Investment Company, a corporation, Hawley Investment Company, a corporation, Pacific Nash Motor Company, a corporation,

Appellants,

vs.

John P. McLaughlin, collector of internal revenue for the first district of California,

Appellee.

REPLY BRIEF OF APPELLANTS.

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TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 5689.

IN THE

United States

Circuit Court of Appeals,

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Appellants,

vs.

John P. McLaughlin, collector of internal revenue for the first district of California,

Appellee.

REPLY BRIEF OF APPELLANTS.

We believe the court will find that we have sufficiently answered in our original brief most, if not all, of the points raised in the brief of appellee. In addition certain errors in appellee's brief require correction.

The Questions.

The facts are not in dispute. The questions before this court are purely questions of law.

First, were the appellants affiliated during the calendar year 1922 within the meaning of section 240 (c) of the Revenue Act of 1921;

Second, are the appellants precluded from recovering the taxes herein sued for because of failure to pay the taxes under protest?

A third point mentioned in appellants' original brief, namely: "Assuming the appellants to be so affiliated for the calendar year 1922, are they entitled to have their tax liability computed as a unit when they originally filed separate income tax returns for said year 1922?" was not referred to in appellee's brief.

We hence assume concession with our contention that the Commissioner of Internal Revenue granted permission to appellants to file a consolidated return for 1922.

I.

Affiliation.

The facts upon which the right of affiliation is predicated need not be restated. Diagram No. 1 hereto appended illustrates graphically the facts.

In our original brief we cited the case of *Great Lakes Hotel Company v. Commissioner,* 30 Fed. (2d) 1, as an authority for the principle that the word "controlled" in section 240 (c) of the Revenue Act of 1921 was broader than the word "owned" and for authority that "control" was present where there were inter-company transactions, where the minority stockholders purchased their stock because of their good opinion of the integrity and business ability of the majority stockholders, where an oral agreement between the minority and majority stockholders existed that the minority stockholders would, in case they desired to sell their stock, first offer it to the parent company, and where the minority stockholders

gave proxies to the majority stockholders. *In that case, minority stockholders owning no stock in the parent owned from 22 to 29% of the total stock of the various subsidiary companies.* The court held that the stockholders of the parent controlled the minority stock of the subsidiaries under the above stated facts.

Appellee's brief, page 3, in referring to the Great Lakes Hotel case, says that "All parties seemed to agree that the * * * 'equitable title' to the stock of *all* corporations 'rested in the individuals of the Stevens organization', i. e., the same individuals equitably owned all the stock".

The appellee's brief then states that the Great Lakes Hotel Company case stands for the same principle as the case upon which appellee relies, *Commissioner v. Adolph Hirsch*, namely that "control" means "equitable ownership".

The findings of fact of the United States Board of Tax Appeals in that case, *Hirsch v. Commissioner*, 7 B. T. A. 707, shows that the facts as stated by appellee are erroneous. The language of the Appellate Court quoted above applied only to the stock of the parent company, and not to the minority stock of the subsidiaries. The stock of H. L. Stevens & Company was owned by its officers and employees. They, however, had executed a voting trust giving certain persons known as the "Stevens Associates" the sole and exclusive power to vote the stock of H. L. Stevens & Company owned by them. *None of the minority stock of the subsidiaries was placed in the voting trust or was owned by the "Stevens Associates".* It was in construing this voting trust agreement that the board found as follows:

> "Notwithstanding the provisions of paragraph VII of the trust agreement above quoted, counsel for both the petitioner and the respondent have apparently regarded legal title to this stock as being in the 'Stevens Associates' and the equitable title thereto as resting in the individuals of the Stevens organization indiscriminately."

The board's findings clearly show that neither the parent company, its stockholders nor the "Stevens Associates" had any interest, legal or equitable, in the minority stock of the subsidiary companies amounting to 22 to 29% of the total. The court held, however, for the reasons stated above, that the parent company and its stockholders "controlled" the minority stock in the subsidiaries and all companies were therefore affiliated.

The Great Lakes Hotel case squarely stands for the principle that statutory "control" means nothing more nor less than actual or factual control and that "control" is more comprehensive than "owned".

In the Hirsch case, the stockholders of the Hirsch Company owned but 55.63% of the stock of the Brazilian Company. *They had no control over the 44.37% minority stock* of the latter company. The decision of the court must be predicated on lack of this factual control. The court's finding relative to equitable ownership is based on the case now on appeal here, and in reality was mere *dictum.*

Diagrams Nos. 2 and 3 appended hereto show graphically the stockholdings in the Great Lakes and Hirsch cases.

II.

Payment Under Protest.

A. This Tax Was Paid Under Protest.

We believe the question of protest to be foreclosed by the record. The complaint shows that the tax in this case was paid under protest. [Complaint, Rec. p. 6.]

The answer did not deny this material allegation. [Rec. pp. 13 to 18.] The findings of fact, conclusions of law [Rec. pp. 23 to 25] and judgment on the findings [Rec. pp. 26 to 27] do not state that the taxes were voluntarily paid. While the opinion of the lower court [Rec. pp. 20 to 23] implies voluntary payment, there is nothing in the record to justify such a conclusion.

The pleadings and findings of fact by the lower court must be the guide of this court as to the facts.

> Kendrick Coal & Dock Co. v. Commissioner (C. C. A., 8th Circuit, November 7, 1928) and the cases therein cited.

Material allegations not denied by the answer are taken to be true. This is the statutory rule in California.

> California Code of Civil Procedure, section 462; Appellant's original brief, p. 28.

It is also a well-known rule that "the practice, pleadings and forms and modes of proceeding in civil causes * * * in the District Courts must conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such District Courts are held, any rule of court to the contrary notwithstanding".

> Revised Statutes, sec. 914.

It is equally well settled that admissions in pleadings have judicial force and are binding upon the pleader and cannot be controverted by the pleader in any stage of the case, either in the trial court or on appeal.

Bancroft's Code Pleading, vol. I, section 429;
Rogers v. Brown, 15 Okla. 524, 86 Pac. 443.

This is true whether the admission is in the complaint or is an admission by failure to deny allegations of the complaint.

Bancroft's Code Pleading, sec. 431;
Ensele v. Jolley, 188 Cal. 297, 204 Pac. 1085.

It is therefore clear from the above citations and reference to the pleadings that the taxes herein sought to be recovered must be deemed to have been paid under protest.

B. Payment Under Protest Is Not Essential.

For the benefit of the court, some reference should be made to appellee's contentions with regard to payment under protest, although we consider this discussion academic only.

The appellee's brief makes a plea to spare the collector from the hardship of a personal judgment against him.

The Revenue Acts specifically provide that the government must pay all judgments recovered against a collector upon the issuance by the court of a certificate of probable cause. The government even furnishes defense counsel for the collector.

In *Weir v. McGrath,* U. S. District Court, Southern District of Ohio, Western Division, decided May 21st,

1928, paragraph 1659, 1928 Prentice-Hall, 6 American Federal Tax Reports (unreported), the court said in construing section 1014 of the Revenue Act of 1924:

> "It is our opinion that the addition of a provision making protest or duress unnecessary is but a recognition of the fact that in substance and true effect the recovery is from the government and an example of liberality and fairness upon the part of the government and a disinclination to retain the benefit of that which has wrongfully been collected whether technicalities have been complied with or not."

The appellee's brief on page 4 states that the elimination of payment under protest as set forth in section 1014 of the Revenue Act of 1924 does not apply to taxes already paid.

Section 1014 must refer to taxes already paid. The only limitation is that it does not cover suits already instituted. The report of the committee on ways and means dated February 11, 1924, quoted page 36, appellants' original brief, indicates clearly that Congress was dealing with taxes that had already been paid.

Appellee's brief questions the power of Congress to deprive the collector of an existing defense. It is well settled that the legislature may deprive a party of technical defenses involving no substantial equities.

12 Corpus Juris 973;
West Side Belt Railroad Co. v. Pittsburgh Construction Co., 219 U. S. 92.

No federal statute ever required that taxes be paid under protest as a condition precedent to their recovery. If such a condition precedent exists, it must be predicated

on case or common law. There is no vested right in a mere rule of the common law.

Chicago Railroad Co. v. Tranbarger, 238 U. S. 67;
Mondo v. N. Y. Railroad Co., 223 U. S. 1.

It is also well settled that Congress has the power to take away from a collector a common law defense as to taxes which have already been paid provided the defense was a technical one only.

> "Statutes removing conditions precedent to the maintenance of an action may operate retrospectively without interfering with vested rights as they affect the remedy only."
>
> 12 Corpus Juris p. 976.

See, also:

Brainard v. Hubbard, 12 Wall (U. S.) 1;
Phoenix Insurance Co. v. Pollard, 63 Miss. 614.

Respectfully submitted,

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ALAMEDA INVESTMENT CO. VS. McLAUGHLIN No. 5689

CIRCUIT COURT OF APPEALS - NINTH CIRCUIT

I. HAWLEY INV. CO. ACTS AS GUARANTOR AND BAILEE OF ALL OF ALAMEDA'S BUSINESS VENTURES.

II. S. S. HAWLEY AND MEEK FAMILY CONSTITUTE "SAME INTEREST," BECAUSE OF RELATIONSHIP.

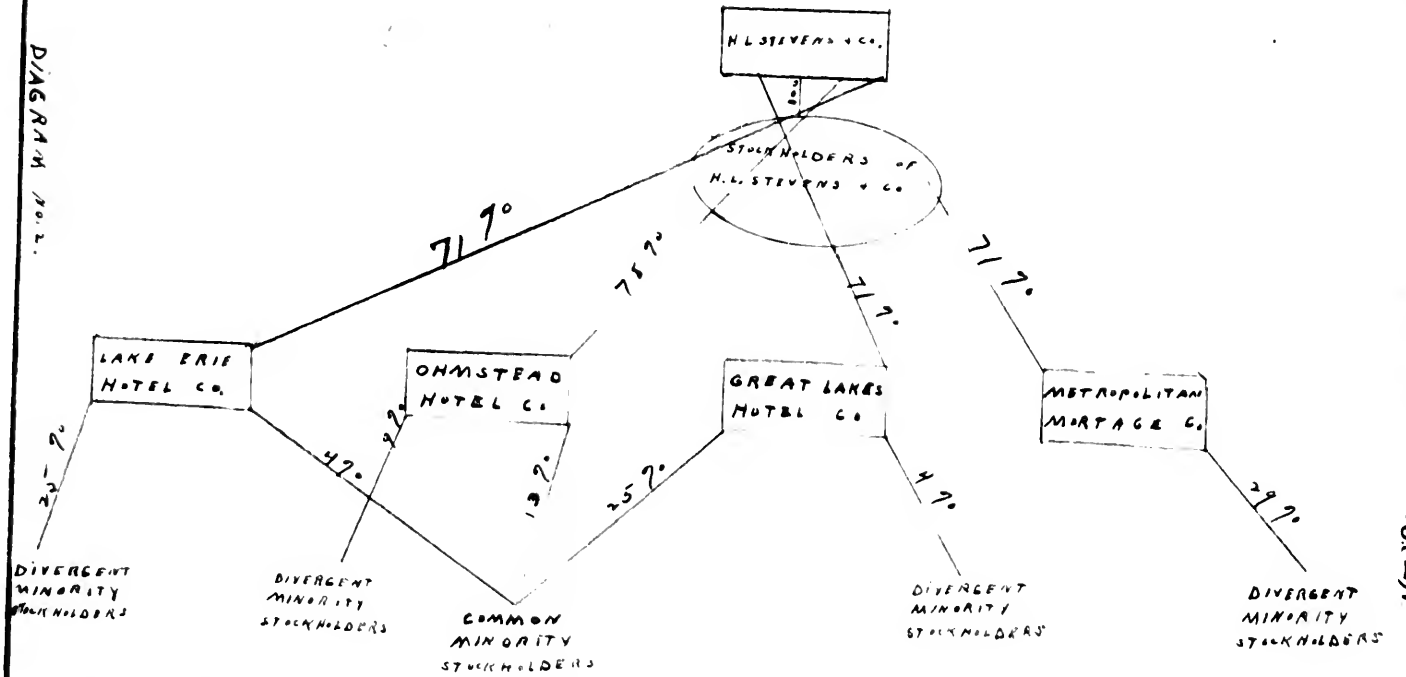
III. S.S. HAWLEY, BY POWER OF ATTY, VOTES STOCK OF MEEK CO. OWNED BY HIS WIFE + MOTHER IN LAW; IS MANAGING DIRECTOR OF MEEK CO, AND VOTES ITS STOCK IN ALAMEDA CO.

IV. S.S. HAWLEY AND HAWLEY INV. CO. CONSTITUTE SAME INTERESTS AND OWN OR CONTROL ALL THE STOCK OF ALAMEDA.

DIAGRAM No. 1.

DIAGRAM NO. 2.

GREAT LAKES HOTEL CO. Vs. COMM. OF FED. (1)



I MAJORITY STOCKHOLDERS: PURCHASED STOCK ON STEVENS NAME; AGREED TO GIVE PARENT FIRST CHANCE TO BUY THEIR STOCK; GAVE PROXIES TO CONTROLLING STOCKHOLDERS REGULARLY. THIS CONSTITUTED CONTROL

II AFFILIATION WAS ALLOWED: CORPORATIONS WERE A "BUSINESS UNIT", MAJORITY STOCKHOLDERS CONSTITUTED "CLOSELY AFFILIATED INTERESTS" AND OWNED PART OF THE STOCK AND CONTROLLED THE BALANCE. "CONTROLLED" IS BROADER THAN "OWNED"

COMMISSIONER VS. ADOLPH HIRSCH & CO. INC. 30 F.2D (2d) 694.

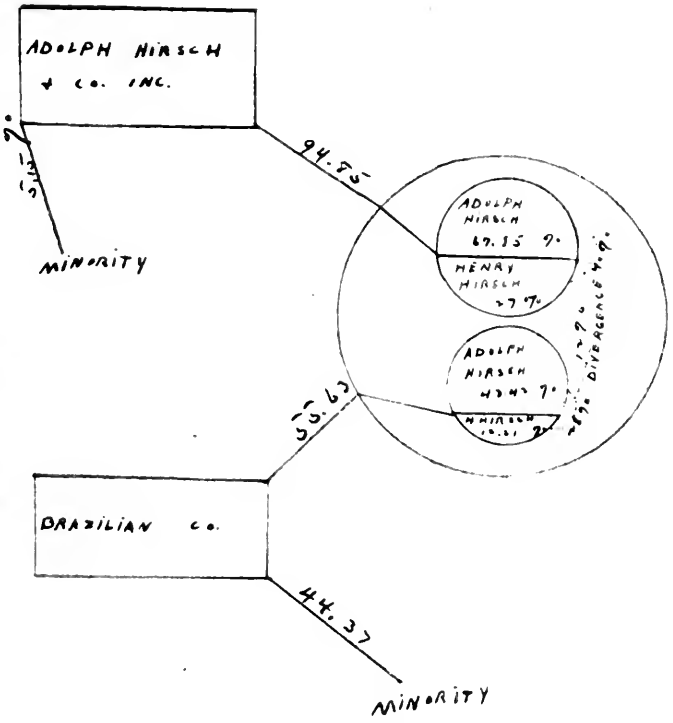


DIAGRAM No. 3.

I. HENRY HIRSCH OWNED 27.7% AS MUCH STOCK IN SUBSIDIARY AND 40.7% AS MUCH STOCK IN PARENT COMPANY AS HIS BROTHER ADOLPH, MAKING A 12.9% DIVERGENT INTEREST.

II. NEVERTHELESS, COURT HELD THEY WERE "SAME INTEREST" BECAUSE THEY WERE RELATED.

III. PARENT CONTROLLED BUSINESS OF SUB.

IV. MINORITY STOCK OF SUB. NOT CONTROLLED, AS ACQUIESCENCE, FRIENDSHIP OR PROFESSIONAL RELATIONS DO NOT CONSTITUTE "CONTROL"; NEITHER DOES CONTROL OF CORPORATE BUSINESS.

V. CONTROL OF STOCK REQUIRED.

VI. SINCE THERE WAS NO "CONTROL" OF MINORITY STOCK OF SUB., IT WAS UNNECESSARY FOR COURT TO ADD THE SUPERFLUOUS COMMENT THAT "CONTROL" MEANS BENEFICIAL INTEREST.

No. 5689.

IN THE

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Alameda Investment Company, a corporation;

Hawley Investment Company, a corporation;

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vs.

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Appellee.

PETITION FOR REHEARING.

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Appellee.

PETITION FOR REHEARING.

To the Honorable Presiding Justice and Associate Justices of the U. S. Circuit Court of Appeals for the Ninth Circuit:

Appellants, Alameda Investment Company, Hawley Investment Company and Pacific Nash Motor Company, respectfully petition for an order granting a rehearing in the above entitled case.

With all due deference and respect we beg to call Your Honors' attention to what we believe to be errors of fact in the decision of this court which should, we submit, be

sufficient to induce this court to grant a rehearing. In addition we feel that the court has overlooked the express terms of the statute and the settled principles of law applicable to the true facts of the case, which, we submit, is a proper basis for a rehearing.

I.

We Respectfully Submit That the Court Erred in Finding That the Respondent Denied in His Answer the Allegation of the Complaint That Separate Returns Were Filed "Without Knowledge of the Right to File Consolidated Returns."

The complaint in paragraph 10, Record, page 5, alleged as follows:

> "Said plaintiff corporations through inadvertence, *and without knowledge* that they were entitled to file a consolidated return of income * * * filed with the Defendant separate returns of income for the calendar year 1922."

The Respondent in answering paragraph 10 of the complaint [Record p. 15] plead as follows:

> "Defendant denies that any tax returns whatsoever were filed by plaintiff corporations through *inadvertence*, and particularly alleges that for the calendar year 1922 the individual and several returns of plaintiff corporations were not filed through *inadvertence*, but same were properly filed according to provisions of the Revenue Act of 1921."

The decision of this court reads as follows:

> "We have not lost sight of the fact that the complainant alleged that the separate returns were made through inadvertence and without knowledge that the taxpayers were entitled to make a consolidated return, but the allegation was denied by answer and no proof whatever was offered in its support."

We respectfully point out that the answer did not deny the "without knowledge" allegation of the complaint. The denial of inadvertence is not a denial of lack of knowledge. Inasmuch as the answer did not deny that the separate returns were filed without knowledge, the complainants did not need to introduce testimony or to offer proof that the separate returns were made without knowledge of the right to file a consolidated return. This error of fact is exceedingly important. No binding election can be imposed upon appellants without knowledge of the two inconsistent remedies. This principle is more fully set forth in our original brief on pages 28 and 29.

II.

We Also Respectfully Submit That the Court Erred in Finding That the Commissioner of Internal Revenue Denied the Appellant, Alameda, Permission to File a Consolidated Return.

The three appellant corporations originally filed separate returns. Later they filed a conslidated return. The Commissioner approved the consolidated return, except that he ruled that the Alameda Investment Company was not affiliated with the two other appellant companies.

This Honorable Court said that the Commissioner excluded the Alameda from the consolidated group because he had denied the Alameda permission to change from a separate to a consolidated return basis.

We believe this is erroneous. We have previously shown that the Alameda was a part of the affiliated group in 1922.

Therefore, this matter is governed by section 240 (a) of the Revenue Act of 1921. That section provides:

> "That corporations which *are affiliated* * * * may * * * make *separate* returns or * * * make *a* consolidated return."

What does this language mean? The Commissioner has construed the language in Solicitor's Memorandum #2682, Cumulative Bulletin IV–1, 238, as follows:

> "The language of section 240 (a) is specific. It states that, 'Corporations which *are affiliated* * * * may make *separate* returns *or* * * * make *a* consolidated return.' This language can mean but one thing, that the group as a *whole* may render individual corporate returns, or that the *group* as a *whole* may render *a* consolidated return * * * they *must* for any taxable year * * * file *one* consolidated return for the *entire group, or* file individual returns for *each* corporation."

This section and the interpretation of the section, clearly shows that an affiliated group cannot be split. Part of the corporations in the group cannot file a consolidated return, while other corporations of the group file separate returns. Since this is the specific terms of the statute then it applies to both taxpayers and the Government.

It is contended by the Respondent that the companies could not file an amended consolidated return without securing the permission of the Commissioner to change their basis from separate to consolidated returns. Naturally when the Commissioner is asked for permission to change the basis from separate to consolidated returns he will want to examine the stockholdings and stock control of the corporations to see whether or not they *are affiliated.*

In this case the Commissioner examined the amended consolidated returns filed for these companies for the years 1920, 1921 and 1922. He freely gave the companies permission to change their basis from the filing of separate to the filing of consolidated returns for those three years. [Respondent's Exhibit No. 4, Record p. 57.]

The Commissioner's "ruling letter" shows that the Commissioner allowed the Alameda Investment Company to be affiliated with the other appellants until December 1st, 1920, when twenty-five per cent of its stock was acquired by the H. W. Meek Estate, Inc. The Commissioner denied the Alameda affiliation with the other companies after that date, and ordered it to file separate returns after December 1st, 1920. What reason did the Commissioner give for excluding the Alameda from the affiliated group?

The reason is given in the ruling letter [Record p. 58]. It said:

> "The Alameda Investment Company *was not affiliated* during these years, *and* should have filed a separate return for each of these years."

The Commissioner did not say that he was denying affiliation to the Alameda because he was denying it the privilege to change its basis from the filing of a separate return to the filing of a consolidated return, or for any other reason except that in his opinion substantially all of its stock was not owned or controlled by the same interests which owned or controlled substantially all of the stock of the other two appellant companies. The reasons *given* by the *Commissioner* for denying the Alameda inclusion in the affiliated group *should govern.*

The lower court and this Honorable Court said that the Commissioner excluded the Alameda from the affiliated group because the Commissioner denied the Alameda permission to change its basis from the filing of separate to the filing of a consolidated return. This ruling seems to overlook the express provisions of the statute which clearly says that some of the corporations of an affiliated group cannot file a consolidated return while other corporations of the affiliated group file separate returns.

This Honorable Court can only say that the Commissioner *denied* the Alameda *permission to change its basis* of filing returns by *presuming* that the *Commissioner violated the statute.*

It is a well known presumption that public officers are presumed to have acted in accordance with the provision of law. There is no presumption that a public officer has acted unlawfully.

To rule against the appellants in this case on the *theory* that the *Commissioner denied* the Alameda the *permission* to *change* its *basis* of filing returns, is to *deny* to the *appellants* a *judicial review* of the *question* of *affiliation.* There is no unreviewable discretion in the Commissioner in regard to affiliation. The conditions warranting affiliation are specifically contained in the statute.

There is *no question* of *election in this case.* The only question is affiliation (and protest). The Commissioner readily gave appellant companies permission to file consolidated returns *provided* they could *prove* that they were *affiliated.* The Commissioner does not believe that the Alameda is affiliated with the other two companies, but

the Commissioner *never contended* that he had *denied* the *Alameda permission* to *change* its *basis.*

Your Honors will recall that the Respondent in his reply brief did not mention the question of election brought out by the lower court, nor did he mention this question at the hearing even after counsel for appellants had called Your Honors' attention to the fact that the Respondent did not mention the question of election in his reply brief. Counsel for appellants mentioned at the oral argument that the Respondent had apparently conceded that the Alameda had been given permission to change its basis from the filing of a separate to the filing of a consolidated return. Even then counsel for the Respondent did not deny that the Government had conceded this point, or say one word about it.

Now if the Commissioner did deny the Alameda permission to change its basis as stated by this Honorable Court, then that denial was in violation of the statute and amounted to the Commissioner's exceeding his authority or of abusing his discretionary powers. In either case his action is subject to judicial review according to the well settled principles of law.

The decision of this Honorable Court doubted that the Commissioner had authority to impose an obligation on either the Government or the Collector to refund taxes by permitting a change in the basis of filing returns.

We respectfully suggest that this doubt is not well founded. The statute seems to give the Commissioner such authority. If the statute does not give the Commissioner the authority to permit a change of basis for *1922,* then the election contained in section 240 (a) is not

binding upon the taxpayers for the year 1922. This is particularly true where the taxpayers filed separate returns for 1922 without knowledge of their right to file a consolidated return. Furthermore, while the result of permitting a change of basis in this case for 1922 would be a refund to appellants, the result in later years would probably be of advantage to the Government. Consolidation does not always help the taxpayer. In later years the appellants might be required to pay more tax on a consolidated return than they would on separate returns, but by reason of filing a consolidated return for 1922 they would be required to pay the excessive tax in the later years. The Commissioner, therefore, is not giving away money or rights of the Government, but is simply making a bargain or contract in behalf of the Government, for which the Government will receive a valuable consideration later.

SUMMARY.

We respectfully submit:

1. That the appellants filed their original separate returns without knowledge of their right to file a consolidated return.

2. That no binding election can be imposed on appellants where they did not have knowledge of their two inconsistent remedies.

3. That the Commissioner gave appellants, including Alameda, permission to file an amended consolidated return for all companies that were, in 1922, affiliated within the meaning of the statute.

4. That the Commissioner had the authority so to do.

5. That the statute did not permit some companies of an affiliated group to file a consolidated return, while other companies of the group filed separate returns.

6. That the Commissioner did not have authority to permit some companies of an affiliated group to file a consolidated return, and to deny the like privilege to other companies of the affiliated group.

7. That there is a presumption that public officers have performed their duties in a lawful manner.

8. That there is no presumption that public officers have acted in violation of the statute, or in excess of their authority, or that they have abused their discretionary powers.

9. That it would be an abuse of the Commissioner's discretionary power, and a violation of the specific provisions of the statute for the Commissioner to permit certain companies of an affiliated group to change their basis from the filing of separate to the filing of a consolidated return, while denying the like privilege to other companies of the affiliated group. That such abuse or excess of authority, or violation of the statue would be subject to judicial review.

10. That the Commissioner said that he excluded the Alameda from the affiliated group because he thought it was not affiliated, and not for any other reason.

11. That for the court to rule against the appellants on the ground that the Commissioner had denied the Alameda the right to change its basis from the separate to a consolidated return, would be to deny the appellants the right of judicial review of the question of affiliation.

binding upon the taxpayers for the year 1922. This is particularly true where the taxpayers filed separate returns for 1922 without knowledge of their right to file a consolidated return. Furthermore, while the result of permitting a change of basis in this case for 1922 would be a refund to appellants, the result in later years would probably be of advantage to the Government. Consolidation does not always help the taxpayer. In later years the appellants might be required to pay more tax on a consolidated return than they would on separate returns, but by reason of filing a consolidated return for 1922 they would be required to pay the excessive tax in the later years. The Commissioner, therefore, is not giving away money or rights of the Government, but is simply making a bargain or contract in behalf of the Government, for which the Government will receive a valuable consideration later.

SUMMARY.

We respectfully submit:

1. That the appellants filed their original separate returns without knowledge of their right to file a consolidated return.

2. That no binding election can be imposed on appellants where they did not have knowledge of their two inconsistent remedies.

3. That the Commissioner gave appellants, including Alameda, permission to file an amended consolidated return for all companies that were, in 1922, affiliated within the meaning of the statute.

4. That the Commissioner had the authority so to do.

5. That the statute did not permit some companies of an affiliated group to file a consolidated return, while other companies of the group filed separate returns.

6. That the Commissioner did not have authority to permit some companies of an affiliated group to file a consolidated return, and to deny the like privilege to other companies of the affiliated group.

7. That there is a presumption that public officers have performed their duties in a lawful manner.

8. That there is no presumption that public officers have acted in violation of the statute, or in excess of their authority, or that they have abused their discretionary powers.

9. That it would be an abuse of the Commissioner's discretionary power, and a violation of the specific provisions of the statute for the Commissioner to permit certain companies of an affiliated group to change their basis from the filing of separate to the filing of a consolidated return, while denying the like privilege to other companies of the affiliated group. That such abuse or excess of authority, or violation of the statue would be subject to judicial review.

10. That the Commissioner said that he excluded the Alameda from the affiliated group because he thought it was not affiliated, and not for any other reason.

11. That for the court to rule against the appellants on the ground that the Commissioner had denied the Alameda the right to change its basis from the separate to a consolidated return, would be to deny the appellants the right of judicial review of the question of affiliation.

12. That the respondent did not in his brief or in oral argument contend that the Alameda had been denied permission to change its basis from the separate to the consolidated return.

13. That there is no question of election in this case.

14. That the only questions involved are, were the companies affiliated and was the tax paid under protest, and if not paid under protest then was protest necessary?

Accordingly we respectfully submit that a rehearing should be had and the decision revised as to both law and fact, believing that a re-examination of the record after rehearing, wherein counsel will be able to assist the court better to examine and understand the record, will result in a revision and reversal of the decision herein, and that a miscarriage of justice will occur if this case is not reversed.

Respectfully submitted,

DANA LATHAM,
MELVIN D. WILSON,
819 Title Insurance Bldg.,
Los Angeles, Cal.,
Counsel for Appellants.

MILLER, CHEVALIER, PEELER & WILSON,
JOSEPH D. PEELER,
819 Title Insurance Bldg.,
Los Angeles, Cal.,
Of Counsel.

CERTIFICATE OF COUNSEL.

State of California, County of Los Angeles—ss.

I, Melvin D. Wilson, being first duly sworn, depose and say that I am one of the attorneys for the Alameda Investment Company, Hawley Investment Company and Pacific Nash Motor Company, appellants in the above entitled cause; that I have read the foregoing petition for rehearing and in my opinion it is well founded; that the petition for rehearing is not interposed for delay.

MELVIN D. WILSON.

Subscribed and sworn to before me this 29th day of June, A. D. 1929.

(Seal) ZELDA M. COLBY,
Notary Public.

APPENDIX.

Opinion of the Circuit Court of Appeals, Ninth Circuit.

Filed June 3, 1929. No. 5689.

Alameda Investment Co., Hawley Investment Co., Pacific Nash Motor Co., appellants, v. John P. McLaughlin, Collector of Internal Revenue for the First District of California, appellee.

Affirming District Court Decision 28 Fed. (2d) 81, Vol. 1.

Rudkin, Dietrich and Wilbur, Circuit Judges.

RUDKIN, Circuit Judge: Throughout the year 1922 the Hawley Investment Company, the Pacific Nash Motor Company and the Alameda Investment Company were corporations organized and existing under the laws of the state of California. During that period Stuart S. Hawley owned or controlled substantially all of the capital stock of the Hawley Company; the Hawley Company owned or controlled substantially all of the capital stock of the Motor Company, and Hawley and the Hawley Company owned or controlled 73½ per cent of the capital stock of the Alameda Company. An additional 25 per cent of the capital stock of the Alameda Company was owned by members of the Meek family, related to Hawley by marriage. During the year in question the Hawley Company and the Motor Company suffered net losses aggregating in excess of $250,000 while the Alameda Company earned a net income in excess of $120,000. In March of 1923 the three corporations made separate income tax returns for the year 1922, under the Revenue Act of 1921, show-

ing losses and gain as above indicated, and upon the return of the Alameda Company there was paid in taxes during the year 1923 the sum of $15,087.27. On June 11, 1924, the three corporations applied to the Commissioner of Internal Revenue for permission to file a consolidated return of income for the year 1922, pursuant to section 240 of the Revenue Act of 1921 (42 Stat. 260), which provides:

"(a) That corporations which are affiliated within the meaning of this section may, for any taxable year beginning on or after January 1, 1922, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner."

The Commissioner permitted the Hawley Company and the Motor Company to file a consolidated return, but denied the like privilege to the Alameda Company on the ground that it was not affiliated with the other two corporations within the meaning of the law. The present action was thereafter instituted against the Collector of Internal Revenue to recover the taxes paid by the Alameda Company on its separate return, and from a judgment in favor of the defendant the plaintiffs have appealed.

It will be observed that under the Revenue Act of 1921 corporations which are affiliated within the meaning of the law may make separate returns or at their option a

consolidated return, under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and the basis upon which the return is made for the year 1922 controls in *succeeding* years unless permission to change the basis is granted by the Commissioner. The separate and consolidated returns differ widely in form, with different results to both the taxpayers and the government, and it would seem *obvious* that when the taxpayers have once made their election, filed their returns, separate or consolidated, and paid their taxes, the election is binding on all parties concerned. We have not lost sight of the fact that the complainant alleged that the separate returns were made through inadvertence and without knowledge that the taxpayers were entitled to make a consolidated return; but the allegation was denied by answer and no proof whatever was offered in its support. Here the Alameda Company made its separate return and paid its taxes. The return was regular in form, the taxes were due the government and were lawfully collected, and the *right or power* of the Commissioner of Internal Revenue to thereafter impose an obligation on either the government or the collector to refund the taxes by permitting a complete change in the return would seem to admit of grave doubt, to say the least. But if it be conceded that the Commissioner had such power in any case, he was under no legal obligation to exercise it in behalf of the appellants and his refusal so to do *is not subject to review in the courts.* Regardless, therefore, of whether the appellants might have made a consolidated return in the first instance, the judgment must be affirmed. It is so ordered.

No. 5690

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES McCORMICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

O'BRIEN, JAMES F., Puget Sound Bank Building, Tacoma, Washington,
Attorney for Appellant.

SAVAGE, ANTHONY, United States District Attorney for the Western District of Washington, Seattle, Washington,

McCUTCHEON, JOHN T., Assistant United States District Attorney for the Western District of Washington, Tacoma, Washington,
Attorneys for Appellee. [1*]

District Court of the United States, Western District of Washington, Southern Division.

July, 1927, Term.

No. 6415.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES McCORMICK,
Defendant.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said

*Page-number appearing at the foot of page of original certified Transcript of Record.

United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 29th day of November, 1927, in this same term, and for the said United States gives the Court here to understand and be informed *that*:

FIRST COUNT.

That on the fifth day of July, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington and within the jurisdiction of this court, JAMES McCORMICK, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit: Twenty-three (23) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known [2] as the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

SECOND COUNT.

That on the seventh day of July, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington and within the jurisdiction of this court, JAMES McCORMICK, then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit: Thirty-two (32) ounces of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

THIRD COUNT.

That on the twenty-second day of July, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington, and within the jurisdiction of this court, JAMES [3] McCORMICK, then and there be-

ing, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit: Three (3) gallons of a certain liquor known as wine, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown intended then and there by the said JAMES McCORMICK for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

FOURTH COUNT.

That prior to the commission by the said JAMES McCORMICK, of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said JAMES McCORMICK, on the 5th day of October, 1920, in cause No. 3038, at Tacoma in the United States District Court for the Western District of Wash-

ington, Southern Division, was duly and regularly convicted of the offense of possess*ion* intoxicating liquor on the 14th day of July, 1920, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and [4] against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington further informs the Court:

FIFTH COUNT.

That JAMES McCORMICK, from the fifth day of July to the twenty-second day of July, inclusive, in the year of our Lord one thousand nine hundred and twenty-seven, near the city of Tacoma, in the Southern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated on the Pacific Highway South of Tacoma, Washington, and known as the Seven-Mile House, then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit: Distilled spirits, wine, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said JAMES McCORMICK, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28,

1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
JOHN T. McCUTCHEON,
Assistant United States Attorney.

[Endorsed]: Filed Nov. 29th, 1927. [5]

COPY OF RECORD FROM U. S. DISTRICT COURT JOURNAL.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division of said District on the 17th day of December, 1927, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said *cause* as follows:

[Title of Cause.]

ARRAIGNMENT AND PLEA.

On this 17th day of December, 1927, defendant with J. F. O'Brien as his attorney is in court and is arraigned. He enters a plea of not guilty and this cause is passed to January 9, 1928, for assignment. [6]

VERDICT.

We, the jury in the above-entitled cause, find the defendant James McCormick is guilty as charged in Count I of the information filed herein; and further find the defendant James McCormick is guilty as charged in Count II of the information filed herein; and further find the defendant James McCormick is guilty as charged in Count III of the information filed herein; and further find the defendant James McCormick is guilty as charged in Count V of the information filed herein.

Z. B. SHAY,
Foreman.

[Endorsed]: Filed Sep. 28, 1928. [7]

MOTION FOR NEW TRIAL.

Comes now the defendant and moves the Court for a new trial herein for the following reasons:

I.

That the jury has received evidence not allowed by the Court.

II.

Misconduct of the jury.

III.

Errors of law occurring at the trial and excepted to by the defendant.

IV.

That the verdict is contrary to law and the evidence.

J. F. O'BRIEN,
Attorney for the Defendant.

Service of the foregoing motion for new trial admitted this 2d day of October, 1928.

JOHN T. McCUTCHEON,
Assistant U. S. Attorney.

[Endorsed]: Filed Oct. 2, 1928. [8]

COPY FROM JOURNAL RECORD OF U. S. DISTRICT COURT.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division of said District on the 13th day of October, 1928, the Honorable EDWARD E. CUSHMAN, United States District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said court as follows:

[Title of Cause.]

HEARING AND ORDER DENYING NEW TRIAL.

On this 13th of October, 1928, a motion for new trial in this cause is presented by J. F. O'Brien for defendant, which motion is submitted without argument and is denied and exception allowed. The

Court pronounces sentence at this time, imposing fine and judgments of imprisonment and orders that he pay the costs of his prosecution for which judgment is rendered against him, execution for costs to issue against him upon motion of the district attorney. [9]

COPY OF RECORD FROM JUDGMENT AND DECREE JOURNAL.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division of said District on the 13th day of October, 1928, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken and correctly copied from the Judgment and Decree Journal of said court as follows:

No. 6415.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES McCORMICK,

Defendant.

JUDGMENT AND SENTENCE.

On this 13th day of October, 1928, defendant James McCormick is before the Court for sentence, and being informed of the information filed against him in this cause and of his conviction of

TESTIMONY OF G. A. GRALTON, FOR THE GOVERNMENT.

Testimony of G. A. GRALTON called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is Gregory A. Gralton. I am a Federal Prohibition Agent working in the Tacoma office, and was so working on July 5, 1927. My identity as a Federal Prohibition Agent was not disclosed at that time. I know the defendant Jim McCormick and the premises known as Seven Mile House, said premises are on the Pacific Highway just outside the city limits on the right-hand side going out, near the Raviola Inn. I was there on July 5, 1927, at about 6:30 o'clock P. M. with five or six companions. We met Jim McCormick at the front part, which was a service station and garage, and Gibson told him we wanted to buy a drink. He ushered us back to the kitchen, he used this place as a residence also, the back part of it, so we went to the kitchen. It was not a restaurant; I could just see that it had been used as a kitchen, somebody had been eating there. Jim McCormick served us each a drink and I paid him for the drinks at the rate of twenty-five cents each. It seems to me that I paid it to Mr. McCormick and I believe he put it in his pocket. Then I called for a pint of whiskey and McCormick sold me a pint. This was on July 5, 1927. Exhibit No. 1 is the pint that I bought

(Testimony of G. A. Gralton.)

from Jim McCormick on July 5, 1927. From my experience as a Federal Prohibition Officer the drinks bought at that time were liquor, distilled spirits, moonshine whisky, with alcoholic content over one-half of one per cent of alcohol by volume and fit for use as a beverage. I turned Exhibit No. 1, after labeling it, over to Mr. Kinnaird. On July 7, 1927, I was back to the same premises at about 2:30 P. M. with the same party of [12] men and Agent Van Campen and went to the kitchen of McCormick's place. McCormick met us at the front of the place and let us back into the kitchen, and both Agent Van Campen and myself bought a round of drinks at twenty-five cents each. This was on July 7th, and from my experience as a prohibition officer would say that the drinks contained more than one-half of one per cent of alcohol by volume and were fit for use for beverage purposes. Shortly after this Agent Van Campen called for and was sold by James McCormick a pint of whiskey. I saw the transaction and Exhibit No. 2 is the pint of whisky which Van Campen purchased from McCormick on July 7th, and will say that it contained more than one-half of one per cent of alcohol by volume and is fit for use for beverage purposes. This exhibit was also turned over to Agent Kinnarid, after I had labeled it for evidence.

Cross-examination by Mr. O'BRIEN.

The labels on exhibits 1 and 2 were written by me, but the initials on the labels I did not write. I was at McCormick's place on July 5, 1927, with

(Testimony of G. A. Gralton.)

a man by the name of Gibson and other men, whose names I do not know, but at that time I believe they were special deputy sheriffs. I think that was the title they had. And they together with Van Campen and myself were getting evidence at other places along about that time. I do not know where Mr. Gibson or Mr. Kelley are now. Mr. Van Campen was at that time a prohibition officer. We went there this night of the 5th about 6:30. It seems to me when I first saw McCormick he was standing near the entrance to his service station. I never saw him before, but one of the boys told me he was McCormick. We started out about noon that day, if I am not mistaken, and probably had not been to any other place that day, maybe one or two. In some places I visited I drank and others [13] we purchased. Possibly I drank one glass that afternoon before I visited McCormick. I remained a few minutes, about ten or fifteen minutes at the place, evidently some of the rest of the party knew Mr. McCormick. I don't know if this is Mr. McCormick's home. I saw a bedroom and dining-room which had been occupied, which were connected with the kitchen I spoke of before.

I don't know the names of the other parties, except Gibson and Kelley. We had picked them up in the afternoon and we all traveled around together in automobiles. July 5th was the first day I worked with these people. On the 7th we came there about 2:30 with practically the same people. We may have been at a couple of other places be-

(Testimony of G. A. Gralton.)

fore going there, and Mr. Van Campen was with me and bought a pint of liquor, and James McCormick sold other liquor besides this pint.

Redirect Examination by Mr. McCUTCHEON.

Had a conversation of a casual nature with the defendant and was only there a few minutes, the first time, about the same length of time at each visit, ten or fifteen minutes. I may have drank one glass of whisky before coming there and I may not have drank any, and I don't recall whether I drank any on July 7th before going to McCormick's. I had not visited over three or four places and a couple of these I got bottles and it was not necessary to take a drink. I was not intoxicated on July 5th or 7th.

Recross-examination by Mr. O'BRIEN.

I said it was intoxicating liquor that I bought. [14]

TESTIMONY OF W. H. KINNAIRD, FOR THE GOVERNMENT.

Testimony of W. H. KINNAIRD, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is W. H. Kinnaird and I am Deputy Prohibition Administrator in Tacoma. I know the premises known as the Seven Mile House and know the defendant when I see him. I was out there on July 22, 1927, with three agents and Customs In-

(Testimony of W. H. Kinnaird.)

spector Ballinger. Jim McCormick was not at the place when we arrived. There was a man there attending the gasoline pump and I told him we had a warrant and went in. After searching for some time I found a trap in the wall between the two bedrooms. There was a closet and on the wall I found a trap into the wall. There was a coat hanger and by pushing up on the coat hanger the boards would slide in the groove, and you could see the wine in there. This closet wall was between the two bedrooms, between the walls there was about three feet of space between the two rooms, and there were two or three separate compartments and this wine was in there, and there were some empty bottles, and three gallons of wine, marked as Exhibit No. 3. After I seized it I took the sample to the United States chemist at Seattle. The chemist's name is Hugo Ringstrom. Exhibit No. 3 was taken out of this cache spoken of. Exhibit No. 1 was turned over to me by Agent Gralton and I put it in the vault in the Federal Building, of which I have custody of, and brought it to court to-day Exhibit No. 1 was offered in evidence and admitted. Witness identified Exhibit No. 2 and it was admitted.

I received Exhibit No. 3 from the chemist and brought it back and put it in the vault and have had possession of it ever since. In the kitchen we found another cache built just like [15] the one we found in the closet. We found various bottles and jugs out in the garage. I went out and found

(Testimony of W. H. Kinnaird.)

a cache in the garage. Up near the top of the garage was a spring—looked like a wall but there was some way to open it and it came down and there was a bunch of kegs up there that had contained whisky. I do not know how many but quite a few. The kegs were ten and five gallon kegs. The cache in the garage was not an old one. It had been used quite a bit but I do not think the building had been there very long. I had two or three conversations with the defendant when he first came up. When we were searching a dresser there in the place there was a box containing twenty-five or thirty silver dollars, and I turned it over to the garage attendant, and told him he better take the money. Mr. McCormick was not there when I came. I told him I had given this man the money and he said it was all right to keep it. He came to me and he said, "Kinnaird, I want to ask you a question and I know you will tell the truth." I said if I told him anything it would be. He said, "Have you got 'buys' on me?" and I said, "Yes, Jim, I have had a couple of men make buys of whisky." He said, "Yes, that's right, but they didn't buy any wine." I said, "No, I am not claiming they bought any wine." That was in the presence of Jim McCormick and Raney.

Cross-examination by Mr. O'BRIEN.

You related that conversation once before, Mr. Kinnaird, I heard that once before. Answer: I do not recall testifying in the preliminary hearing.

(Testimony of W. H. Kinnaird.)

Q. Isn't it a fact that he said no such thing as "That's right," that he said to you, "You have no sales of wine?"

A. He said, "That's right," or "That's true," "but," he said, "I haven't sold any wine," I said, "No, we are not claiming you [16] sold any wine." Mr. McCormick may be pretty hard of hearing. I have talked to him several times and have never had any trouble making him hear me. Referring to Exhibit No. 3 I do not recall how long it was after I received it before it was analyzed. I would say about ten days, maybe more, maybe less. July 22d was the first time I ever searched the McCormick place. It is not a fact that our office had searched that place two or three times in the year prior to this. We found Exhibit No. 3, in the cache together with two other gallons of the same material. Mr. McCormick complained after the raid that he had lost his naturalization papers and some money. Someone took an ax and pried open the dresser as it had a Yale lock on it. The dresser was a large one, full of papers and a little of everything. There was a locked car standing in the garage. It was an enclosed car with windows in it, and somebody took an ax and pried it and the door came open. It made a small mark on the car, nothing but a little bulge. We did not find anything in the car. I am acquainted with Mr. Van Campen and saw him about a week ago.

(Testimony of W. H. Kinnaird.)

Redirect Examination by Mr. McCUTCHEON.

I do not know if Mr. Van Campen was subpoenaed. I talked with the clerk in your office and told her I needed him. I have known James McCormick since July, 1926. I was out to his place a number of times before July but never searched his premises.

Q. Do you know the reputation of these premises on and between the dates July 5, 1927 and July 22, 1927, as a place where intoxicating liquor was bought and kept?

Mr. O'BRIEN.—Don't answer. [17]

Mr. McCUTCHEON.—Well, and or kept.

Mr. O'BRIEN.—If your Honor please, I object to that as incompetent, irrelevant and immaterial—not proper to show the reputation of a place where the evidence itself shows that if there has been a violation of the law, that that violation was done by the defendant himself.

The COURT.—I take it every case is more or less to be governed by the evidence in that particular case. Now, this statute making it a nuisance, not only making the place a common nuisance where intoxicating liquor is manufactured and sold, but also where it is kept. I don't see why the rule you have invoked, why it would be applicable here to this place and the garage whether it was a nuisance or not.

Objection overruled. Exception allowed.

Mr. McCUTCHEON.—You may answer.

(Testimony of W. H. Kinnaird.)

A. I do.

Q. What was that reputation?

Mr. O'BRIEN.—Same objection.

The COURT.—Overruled.

Mr. O'BRIEN.—Exception.

The COURT.—Allowed.

A. It had a reputation of being a place where liquor was kept and sold.

The COURT.—The jury are instructed that the last count in this information, being the fifth count, accuses the defendant of maintaining a common nuisance on the Pacific Highway, known as the Seven Mile House, by then and there manufacturing, keeping, selling and bartering intoxicating liquor, distilled spirits, wine and other intoxicating liquor, containing more than one-half of one per cent of alcohol by volume, fit for use for beverage purposes. Now, you will observe there are [18] two main accusations, that is, the place, it is asserted the place was a common nuisance and asserted that the defendant maintained it as a common nuisance. Now, so far as the place is concerned, the prosecution is entitled to have evidence of the reputation of the place as a place where liquor was kept and sold considered by the jury, but so far as the question is concerned of whether the defendant had anything to do with maintaining that place—that's a separate question and you have no right to consider evidence of reputation as bearing on that last question.

(Testimony of W. H. Kinnaird.)

Cross-examination by Mr. O'BRIEN.

I was never out there until the 22d of July to raid it. I have been in office since July, 1926, and was connected with the office for some time prior to that. I talked to people before and after the raid as to the reputation. I have talked to others beside officers. I have had many people come to my office and tell me about this place. I could not say exactly [19] how long before the 5th of July. I did not make any search of this place before as I could not. I had reliable information that the place was being maintained as a common nuisance but I would have to procure a search-warrant and that would not be sufficient, because it is his home. I did not have any sales before the 5th of July. I cannot recall anybody who spoke to me because these people are reluctant to give their names, either over the phone or when they come to my office.

TESTIMONY OF CHARLES H. GRIFFITH, FOR THE GOVERNMENT.

Testimony of CHARLES H. GRIFFITH, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is Charles H. Griffith. I am a Federal Prohibition Agent and was such on July 5th and 22d, 1927. I know the defendant and know the

(Testimony of Charles H. Griffith.)

premises and was there on July 22, 1927. On that day in the early part of the afternoon in company with agents Raney, Lambert, Kinnaird and Inspector Ballinger, we went to the McCormick place. Search-warrant was served on a man who had charge of the gasoline pumps. A casual search revealed nothing, but on further examination we found one room where there was a lot of stuff piled, some blankets and an army cot. That had recently been lined or ceiled with tongue and grooved boards. Around the walls of this room were clothes hooks. There was a space between the walls we could not account for and we discovered that by shoving upwards on the clothes hook that this tongue and groove panel boards slid up and there revealed quite a space with shelves built in. And there we found the three gallons of wine. We found no intoxicating liquors in these other caches. I went back of the building where there is [20] built a camp-house, such as you find at auto camps, and there is a line of these extending directly back. There are about eight of these rooms with spaces between built in the manner of an auto camp, all under one roof. In the end of this long building there are two toilets. There was a ladder placed against the wall leading up above the toilets. We got an ax and pried on the top of the wall and the top of the wall gave in at once. This extended the entire width of the building and was made in the shape from the eaves to the cone of the roof level with the ceiling over the toilets, making a V-shaped entrance over these toilets.

(Testimony of Charles H. Griffith.)

Inside of this cache was quite a number of kegs, gallon jugs, etc. Many of the jugs smelled strongly of moonshine whisky. While we were searching, Mr. McCormick returned and he was told that a federal search-warrant had been served. I was present at a conversation with McCormick when he first came in. I was just giving the $28.75 in silver, two or three gold watches and some rings, that were taken from the dresser, to the man that the search-warrant had been served on. Mr. Kinnaird asked Jim how much money he had and he said twenty-five or thirty dollars and Mr. Kinnaird said, "That's right," and "We had it here and gave it to the boy." and Mr. McCormick said, "That's all right, let him keep it." I heard Mr. McCormick say to Mr. Kinnaird, "Mr. Kinnaird, have you got 'buys' on me?" and Mr. Kinnaird said, "I have had a couple of men make a purchase, purchase bottles for me, bottles of whiskey," and Mr. McCormick answered, I cannot recall in his own language but it was something to this effect, "While that might be so you never had purchased any wine from me because I had not sold any wine."

Q. Well, do you know what the reputation of this place was on July 22, 1927, as a place where intoxicating liquor was kept or sold? [21]

The same objection was made to this question as was made to the same question to the previous witness, and the objection was overruled and the defendant allowed an exception. The witness then

(Testimony of Charles H. Griffith.)

answered that it had the reputation of being a place where liquor was kept and sold.

Cross-examination by Mr. O'BRIEN.

The 22d of July is the only time I was out there. I never made a search of the place prior to that. There was no liquor found in any of the caches, except where the wine was found. I lived out in that end of town ever since I have been in Tacoma and knew Jim McCormick was living there for probably a year prior to 1927. The kitchen was arranged with the same opening as the caches we found in the bedroom, except that I believe in the kitchen there were nails in place of hooks. The camp-houses, I spoke of, are a separate building from the McCormick home. Jim McCormick told me that he owns and conducts these auto camps. He told me he wanted a place where anybody could go and have a feeling that they would be safe.

TESTIMONY OF HUGO RINGSTROM, FOR THE GOVERNMENT.

Testimony of HUGO RINGSTROM, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is Hugo Ringstrom. I am a chemist in the Bureau of Prohibition in Seattle, and was such in July and August, 1927. I have seen Exhibit No. 3 in Seattle on August 5, 1927. I made an exam-

(Testimony of Hugo Ringstrom.)

ination of the contents and at that time it contained 12.29 per cent alcohol by volume. At that time it was fit for beverage purposes. The contents is red wine. It would depend [22] upon the condition of the sample at the beginning of the period, before I could see whether it would generate alcoholic content in fifteen days appreciably. It might be possible to produce eleven and one-half per cent by volume in fifteen days under weather conditions which existed between July 22d, 1927, and August 5, 1927. This Exhibit No. 3 is made from red grapes.

Cross-examination by Mr. O'BRIEN.

Mr. Kinnaird gave me the sample in Seattle and I made an analysis on the 5th day of August, it may have been the 6th. I do not know what the contents of this was on the 22d of July from my examination.

TESTIMONY OF CHARLES H. GRIFFITH, FOR THE GOVERNMENT (RECALLED).

CHARLES H. GRIFFITH, recalled as a witness on behalf of the Government, having been previously sworn, testified as follows:

Direct Examination by Mr. McCUTCHEON.

I sampled the wine in Government's Exhibit No. 3 on July 22d, 1927, and from my experience as a Federal Prohibition Officer would say that the wine had an alcoholic content of more than one-

(Testimony of Charles H. Griffith.)

half of one per cent by volume and was fit for use for beverage purposes.

Cross-examination by Mr. O'BRIEN.

I just tasted it. It did not taste like vinegar. It did not have an acid taste but was sour.

TESTIMONY OF W. H. KINNAIRD, FOR THE GOVERNMENT (RECALLED).

W. H. KINNAIRD, recalled as a witness on behalf of the Government, having been previously sworn, testified as follows:

Direct Examination by Mr. McCUTCHEON.

I took a taste of Exhibit No. 3 on July 22, 1927 and there was no fermentation going on at that time. [23]

TESTIMONY OF L. S. DOWNING, FOR THE GOVERNMENT.

Testimony of L. S. DOWNING, called as a witness in behalf of the Government, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. McCUTCHEON.

My name is L. S. Downing. I am a soldier with the rank of sergeant at Camp Lewis, and I have been there since May, 1925. I go by the McCormick premises on my way to Camp Lewis and know where they are.

Q. Do you know what the reputation of those

(Testimony of L. S. Downing.)

premises are as a place where intoxicating liquor was kept or sold on July 22, 1927? Just answer "yes" or "no." A. Yes, sir.

Q. What was its reputation in that regard?

Mr. O'BRIEN.—The same objection as to the previous question on this subject. The court overruled. And the witness answered that it was a place where you could get a drink any time when you wanted it.

TESTIMONY OF J. M. STEWART, FOR THE GOVERNMENT.

Testimony of J. M. STEWART, called as a witness on behalf of the Government, after being duly sworn, was examined and testified as follows:

The witness stated his occupation was a captain of infantry in the United States Army at Fort Lewis.

The evidence of this witness was as to the reputation. The same objection was made as to the evidence of the prior witness, which objection was overruled and an exception allowed and the witness answered as the former witness answered.

Testimony of the Government closed.

The defendant to maintain the issues on his behalf introduced the following: [24]

TESTIMONY OF OTTO WROBEN, FOR THE DEFENDANT.

Testimony of OTTO WROBEN, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination.

My name is Otto Wroben. I live at 90th and Union, across from the Seven Mile House. I am acquainted with Mr. McCormick and knew him the early part of July, 1927. I performed some labor for Mr. McCormick commencing on the 2d or 3d of July. On that day Jim McCormick waved at me as I drove downtown with a load of chickens—I am a poultry dealer. I made arrangements with him at that time to feed his dogs for a period commencing the 2d or 3d of July for nine or ten days. I took dog feed there every day from about the 3d of July to the 11th of July. He had three dogs. I went there every day and Mr. McCormick was not on these premises during this time. McCormick wanted to leave to go on a vacation. This is the only time I took care of his dogs.

Cross-examination by Mr. McCUTCHEON.

I fixed that date as the 2d or 3d because I was awfully busy in the poultry business and disliked to haul the feed for him. I also fixed the day because I had to make an extra trip on the 4th—I did not have any delivery downtown of my own.

(Testimony of Millard Ingle.)

I am a friend of Jim McCormick. I have lived there eight years. I got a part of land from him —just a small shack.

TESTIMONY OF MILLARD INGLE, FOR THE DEFENDANT.

Testimony of MILLARD INGLE, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'BRIEN. [25]

My name is Millard Ingle and in July, 1927, I was a prohibition agent in Grays Harbor County. On the 5th day of July, 1927, I had a commissioner's hearing in Cosmopolis. I saw Jim McCormick on the 5th day of July at Cosmopolis about noon, possibly 11:30. I kept a book with a memorandum of where I was at that time. I am acquainted with Mr. Van Campen, who was a prohibition agent along about the 5th or 7th of July last year. I saw him on the 7th of July, 1927, at Aberdeen. I saw him about ten in the morning, it may have been eleven. I recall it to my mind because I was in a still west of Hoquiam, three miles, and had been there practically day and night since the morning of the 6th. Mr. Van Campen brought the meals in there to me. He did this on the 6th and 7th—he was there possibly ten or eleven o'clock in the morning.

(Testimony of Millard Ingle.)

Cross-examination by Mr. McCUTCHEON.

I left the prohibition service July 29th a year ago. I did not voluntarily resign. I was arrested by the Intelligence Department. I have known Jim McCormick for years and know where his place is. The reputation of that place on July 22, 1927, was a place which was reputed to handle liquor for the last few years off and on, different parties.

Redirect Examination by Mr. O'BRIEN.

I have been used as a witness by the United States Attorney, Mr. McCutcheon, here in this court—the last time on Tuesday.

Recross-examination by Mr. McCUTCHEON.

Van Campen brought me my meals on July 7th. He brought me one meal a day. He brought a basket of sandwiches each time and a gallon thermos of coffee, and that generally lasted me over until the next day. I was in there three days. I destroyed the still the 8th of July. He did not bring meals on the 8th because [26] I told him on the 7th. "When you come back to-morrow don't bring anything as I am going to bust it up." I saw him the last time on the 7th of July about noon.

TESTIMONY OF CORA McROBIE, FOR THE DEFENDANT.

Testimony of CORA McROBIE, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'BRIEN.

My name is Cora McRobie. I live in Cosmopolis and have lived there about seventeen years and run a lodging-house there. I know Mr. McCormick and I saw him on the 5th day of July, 1927, at my place in Cosmopolis. He stayed at my place about five days, between four and five days. I saw him every day when he was there. I have known him for about three years.

Cross-examination by Mr. McCUTCHEON.

He came down there to see a friend. His name was Mr. Jennings. I fixed the date because it was after the 4th and I did not have my work done, that's why I remember when he came up after a room. I have never been convicted of a crime. I met McCormick in Cosmopolis about three years ago through his friend Mr. Jennings.

TESTIMONY OF CHARLES STEVENS, FOR THE DEFENDANT.

Testimony of CHARLES STEVENS, called as a witness on behalf of the defendant, after being duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'BRIEN.

My name is Charles Stevens and I run a restau-

(Testimony of Charles Stevens.)

rant on Jefferson Avenue in the city of Tacoma. I am acquainted with Mr. McCormick. In the month of July I heard about Mr. McCormick being arrested—he came in and told me. A few days before the [27] 22d of July, 1927, a man drove up in front of my place and said he had ten gallons of vinegar—said it was wine that had turned to vinegar. Mr. McCormick and I bought it. Mr. McCormick took three and one-half gallons and I took the balance. I used what I took in my place of business for vinegar and pickled meat with some of it. I had occasion to test it. It was sour —nobody could drink it. Any number of people used it for vinegar. I took six and one-half gallons and McCormick took three and one-half and I gave him the jugs to take it home in.

Cross-examination by Mr. McCUTCHEON.

I have never been arrested or paid a fine.

Defense rests.

TESTIMONY OF MILLARD INGLE, FOR THE GOVERNMENT (RECALLED).

MILLARD INGLE, recalled as a witness for the Government, having been previously sworn, testified as follows:

Direct Examination by Mr. McCUTCHEON.

Mr. Van Campen was arrested the same time I was and left the service the same time I did.

Cross-examination by Mr. O'BRIEN.

I saw Mr. Van Campen about a week ago, to be

(Testimony of Millard Ingle.)

positive. I thought I saw him yesterday in Tacoma.

Government rests.

THEREUPON, the counsel for the respective parties argued the case to the jury and the Court proceeded to and did instruct the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY.

The COURT.—You have heard the argument in this case, Gentlemen. There are five counts in this information and four of them are submitted to you for verdict, counts one, two, three and five. The fourth count has been dismissed.

On counts one and two the defendant is accused of the unlawful [28] selling of distilled spirits. In the third count he is accused of the unlawful possession of wine; and in the fifth count he is accused of maintaining a common nuisance by selling and keeping intoxicating liquor.

In each of these counts the liquor is described as containing more than one-half of one per cent of alcohol by volume and being fit for use for beverage purposes.

To each of these four counts the defendant has entered a plea of "not guilty." The entry by an accused of a plea of not guilty places the burden on the prosecution of showing beyond a reasonable doubt, by evidence, the truth of every material allegation in the case.

You will consider each of these four counts separately in reaching a verdict, and if, under all

the evidence, you have a reasonable doubt concerning any material allegation of the particular count you are considering it is your duty to give the defendant the benefit of it and acquit him. If you have no reasonable doubt concerning any material allegation of such count it is your duty to convict.

The particular date mentioned in these counts is not indispensable. That is, taking for example, the dates on which the sales are alleged to have been made, the 5th and the 7th. These dates do not have to be exactly proven. If you should be convinced beyond a reasonable doubt that the sales described by the witnesses, the prosecution's witnesses, actually were made by the defendant as described by the witnesses and as alleged, with the exception of the date, but conclude that the witness was mistaken regarding both these dates, or the particular date you are considering, why, it would be your duty to convict, although you did have a doubt regarding that exact date, or although you [29] concluded that it did not take place on that date, but about that time. But if you find that the witness was mistaken regarding the date you have a right to consider that mistake on his part in determining the credit you give him as a witness and give his testimony.

Next, regarding the two sales counts and the possession count. The amount of liquor that the defendant is accused of having sold in the first and second counts—the evidence is not indispensable that that exact amount or more amount of liquor

was sold. If the evidence convinces you beyond a reasonable doubt of the sale of a substantial amount of such liquor that would be sufficient. But the prosecution is bound to show beyond a reasonable doubt that the liquor was of the nature and character described; that is, in the sales counts that it was distilled spirits and that it contained one-half, or more than one-half of one per cent of alcohol by volume and was fit for use for beverage purposes.

You will understand the word "sell" in its ordinary sense and meaning.

So with the word "possess" in the third count where the defendant is accused of possessing wine. The word "possess" includes the idea of dominion and control, the ability to use the article possessed as the possessor sees fit.

On this matter of possession of this alleged wine; the defendant is accused of being knowingly in the possession of that wine. That word "knowingly" in the third count of the information is a matter on which you have to be convinced beyond a reasonable doubt. If he bought something he thought was vinegar and never learned any better until after it was found on his premises, why, he was not knowingly in the possession [30] of it, that is, he was not knowingly in the possession of wine, although he was in the possession of the wine but not knowingly in the possession of it.

Regarding the nuisance count. You would not have to be convinced beyond a reasonable doubt

before you are warranted in returning a verdict of guilty that the defendant maintained these premises to sell both distilled spirits and wine as alleged. The statute provides that any room, building, or place where intoxicating liquor is kept or sold is a common nuisance, and any person who maintains such a nuisance is guilty of a misdemeanor. It is for a violation of this section of the law that the defendant is prosecuted under the fifth count. The word "kept" as used in that section of the law is used in its ordinary sense. It has a different meaning than "possession." You may possess an article although your possession is fleeting and brief, but if a man keeps an article he contemplates something substantial in the matter of duration of time. This statute provides that where an accused is shown to have been in the possession of intoxicating liquor that that possession is *prima facie* evidence that the liquor was kept for purpose of sale. Before you can apply that rule to the case, however, it is necessary that you be first convinced beyond a reasonable doubt of the possession. If not so convinced you cannot apply the rule. If you are convinced beyond a reasonable doubt of the possession by the accused of such liquor, why, then the law, the statute, has made that *prima facie* evidence that the liquor was kept for purposes of sale.

Now, *prima facie* evidence is not evidence that is insurmountable. It is evidence that is sufficient, in the absence of contradiction or explanation to carry with it the presumption that, as far as this

case is concerned, that the liquor possessed was [31] kept for purposes of sale. It simply means that when the possession is established beyond a reasonable doubt, that the burden shifts from the prosecution to the defendant to explain away that possession—not to explain away the possession—but to explain it in such a way as to show that it was not kept for purposes of sale.

The Court instructed you in the progress of the trial upon this nuisance question, regarding the extent to which you could take into account the reputation of the premises, and that instruction will not be repeated.

There is no presumption arises against the accused because of the fact that he has been informed against by the prosecutor, or because of the fact that he has been brought to trial before you. Every presumption of law is in favor of the accused's innocence, and that presumption of innocence continues with every accused throughout the progress of the case, up until the time that the evidence admitted by the Court shows beyond a reasonable doubt the truth of every material allegation in the information.

A reasonable doubt is such a doubt as would cause a person of ordinary intelligence, caution and determination to pause or hesitate in one of the more important transactions connected with his own affairs. If you have that character of doubt with regard to any material allegation in the particular count which you are considering, you have a reasonable doubt to which the defendant is

entitled to the benefit and an acquittal; if you have no such doubt then you have no reasonable doubt and should convict.

You are in this case, as in every case where questions of fact are tried, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and the credibility [32] of witnesses.

In weighing the evidence and measuring the credibility of witnesses you should take into account their appearance, conduct and demeanor in giving their testimony, whether it is such as to lead you to believe that they were doing all they could to tell you the exact facts, or whether by something in the manner or appearance of the witness you are led to conclude that the witness is trying to keep from telling you all that he or she knew, or misstate that which was told so as to mislead you. Take into account whether or not other witnesses testified too willingly, have told the jury things about which they were not asked and have done so repeatedly. Take into account the reasonableness of the testimony of each witness, whether in the light of all the circumstances it appears probable or whether it appears unreasonable or unlikely. Take into account the situation in which each witness was placed as enabling that witness to know what was said or done on a given occasion, as one witness may have advantages not possessed by another, although of equal honesty. Take into account whether the testimony of a witness has been corroborated where you would expect it to be cor-

roborated if true, or whether it is contradicted by other evidence in the case.

Mr. O'Brien asks you to apply that rule in the matter of Van Campen not being here to corroborate Gralton. Now, if under all the evidence in the case you conclude that you had a right—a reasonable right to expect that if Gralton's testimony were true that Van Campen would have been here to testify in corroboration of it, and not being here you would have a right to conclude that he would not corroborate him. But if there has been a reasonable explanation given in the testimony for the absence of Van Campen [33] you have no right to apply such rule.

Take into account the interest any witness is shown to have in the case, whether that interest was shown by the manner in which the witness gave his or her testimony or by relation of the witness to the case, and the matter out of which it arose.

The defendant had the right to testify in his own behalf. He did not do so. It is equally his right to remain off the witness-stand and not testify, and the fact that he did not testify is nothing on which you have a right to rely in reaching your verdict. You have no right to draw any inference, or conclusion, or deduction to his prejudice on account of his refraining from testifying in his own behalf, and you will not allow yourself to be influenced by that fact, and not allude to it in any argument you may have in your jury-room with your fellow jurors in regard to what your verdict should be.

Mr. McCutcheon stated in his closing argument

that you will not necessarily be bound, in reaching your verdict, by the number of witnesses on a particular point. That is true. The Court has told you the various things you will take into account in measuring the credit of witnesses. However, the number of witnesses that testify for and against a particular fact or matter—rather, disregard the use of the word "fact" there—is something to be taken into account by the jury because human experience is that the greater number, other things being equal, are less liable to be mistaken than the lesser.

Regarding the nuisance count. It is not necessary to constitute a common nuisance that all the activities carried on there be unlawful. If these premises were in part used for the unlawful sale or keeping of intoxicating liquor it would be a common nuisance, although it might in part be used for purposes which were lawful. [34]

The COURT.—Is there anything further, Gentlemen?

Mr. O'BRIEN.—I want to take exception to one instruction. Do you wish me to do it at this time before the jury goes out?

The COURT.—State it now.

Mr. O'BRIEN.—I take exception to that part of your instruction in which you stated to the jury that the dates set forth in the sales counts were not necessary—not necessary that the proof should be sustained as regards these dates. My exception is that the evidence should follow the information exactly as to these dates, otherwise it takes from me

the benefit of my alibi defense which I put in, if they may speculate on some other dates. That is the reason for my exception.

The COURT.—Exception allowed.

After the jury had retired to consider the verdict the jury requested the Court to have Exhibit No. 3, designated as wine by the prosecution's witnesses, sent to the jury-room. This request was made in the absence of the defendant and his counsel and the Court sent to the jury-room Exhibit No. 3.

The jury thereafter returned to court, their verdict finding the defendant guilty on Counts One, Two, Three and Five of the information. Thereafter the defendant served and filed his motion for a new trial, which said motion was on the 13th day of October, 1928, denied. Exception allowed.

And thereupon the Court sentenced the defendant on each of the said counts.

In pursuance of justice and that right may be done the defendant presents the foregoing as his bill of exceptions and prays that the same may be approved, allowed, signed and [35] *and* certified as provided by law, and that all necessary exhibits may be properly certified as by law required.

J. F. O'BRIEN,
Attorney for Defendant.

Service of the foregoing proposed bill of exceptions, by receipt of a copy thereof, is hereby acknowledged this —— day of Nov., 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney. [36]

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on this 10th day of December, 1928, the above cause came on for hearing upon the application of the defendant, James McCormick, to settle the bill of exceptions in this cause, counsel for both parties being present, plaintiff and defendant agreeing that the same contained all the material facts occurring on the trial of said cause, now, therefore, it is hereby

ORDERED, that the foregoing bill of exceptions be and the same is hereby settled as a bill of exceptions in said cause, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a bill of exceptions, and the Clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals.

Dated this 10th day of December, 1928.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed Dec. 10, 1928. [37]

PETITION FOR APPEAL.

Comes now James McCormick, defendant in the above-entitled cause and feeling himself aggrieved by the verdict of the jury and judgment and sentence of the District Court of the United States, for the Western District of Washington, Southern

Division, entered on the 13th day of October, 1928, hereby petitions for an order allowing said defendant to prosecute an appeal to operate as a supersedeas and stay of proceedings under such judgment and sentence from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Western District of Washington, Southern Division, and that your petitioner be released on bail in the sum of Twenty-five Hundred ($2500.00) Dollars, the amount fixed by the Judge thereof pending the final disposition of this cause upon said appeal. Assignment of errors is filed with this petition.

WHEREFORE, this petitioner prays that an appeal to operate as a supersedeas and stay of proceedings under such judgment and sentence issue in this cause in his behalf from the United States Circuit Court of Appeals for the Ninth Circuit aforesaid for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

J. F. O'BRIEN,
Attorney for the Defendant. [38]

Service of the foregoing petition and the assignment of errors and receipt of copies thereof is hereby admitted this 23 day of October, 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney,
Attorney for Plaintiff.

[Indorsed]: Filed Oct. 24, 1928. [39]

ASSIGNMENT OF ERRORS.

Comes now James McCormick, defendant in the above-entitled cause, and assigns the following errors which he avers occurred at the trial of said cause, which were duly excepted to by said defendant, and upon which he relies to reverse the judgment entered against him herein.

The District Court erred as follows:

I.

The Court erred in admitting the testimony of W. H. Kinnaird, a witness for the Government. The testimony of said witness being as follows:

Q. Do you know the reputation of these premises on and between the dates July 5, 1927 and July 22, 1927, as a place where intoxicating liquor was bought and kept?

Mr. O'BRIEN.—Don't answer.

Mr. McCUTCHEON.—Well, and or kept.

Mr. O'BRIEN.—If your Honor please, I object to that as incompetent, irrelevant and immaterial—not proper to show the reputation of a place where the evidence itself shows that if there has been a violation of the law. That that violation was done by the defendant himself.

Mr. McCUTCHEON.—If the reporter will read the question, I thought I did fix the time.

Question was read by the reporter.

Mr. O'BRIEN.—Same objection. [40]

The COURT.—Overruled.

Mr. O'BRIEN.—Exception.

The COURT.—Allowed.

A. It had the reputation of being a place where liquor was kept and sold.

The COURT.—The jury are instructed that the last count in this information, being the fifth count, accuses the defendant of maintaining a common nuisance on the Pacific Highway, known as the Seven Mile House, by then and there manufacturing, keeping, selling and bartering intoxicating liquor, distilled spirits, wine and other intoxicating liquor, containing more than one-half of one per cent, of alcohol by volume, fit for use for beverage purposes. Now, you will observe there are two main accusations, that is, the place, it is asserted the place was a common nuisance and asserted that the defendant maintained it as a common nuisance. Now, so far as the place is concerned, the prosecution is entitled to have evidence of the reputation of the place as a place where liquor was kept and sold considered by the jury, but so far as the question is concerned of whether the defendant had anything to do with maintaining that place—that's a separate question and you have no right to consider evidence of reputation as bearing on that last question.

Mr. McCUTCHEON.—That's all.

II.

The Court erred in admitting the testimony of Charles H. Griffith, Federal Prohibition Agent, a witness for the Government. The testimony of said witness being as follows:

Q. Well, do you know what the reputation of this place was on [41] July 22, 1927, as a place where intoxicating liquor was kept or sold?

Mr. O'BRIEN.—Just a moment; object to that question, the same objection as was made before.

The COURT.—Objection overruled. The jury will remember concerning this testimony the instruction I gave you a few moments ago regarding the testimony of the other witness regarding reputation. The same instruction will apply here.

A. Yes, sir.

Mr. McCUTCHEON.—What was it in that regard?

A. It had the reputation of being a place where liquor was kept and sold.

Q. That's all.

III.

The Court erred in giving to the jury the following instructions:

The particular date mentioned in these counts is not indispensable. That is, taking for example, the date on which the sales were alleged to have been made, the 5th and the 7th. These dates do not have to be exactly proven. If you should be convinced beyond a reasonable doubt that the sales described by the witnesses, the prosecution's witnesses, actually were made by the defendant as described by the witnesses and as alleged, with the exception of the date, but conclude that the witness was mistaken regarding both these dates, or the particular date you are considering, why, it would be your duty to convict, although you did have a doubt regarding

that exact date, or although you concluded that it did not take place on that date, about that time. But if you find that the witness was mistaken regarding the date you have a right to consider [42] that mistake on his part in determining the credit you give him as a witness and give his testimony.

IV.

The Court erred in sending to the jury-room after the jury had retired and upon their request, and in the absence of the defendant, and without his consent, Exhibit Number Three, called red wine.

V.

The Court erred in overruling the defendant's motion for a new trial.

And as to each and every assignment of errors, as aforesaid, the defendant says: That at the time of making the order and ruling of the Court complained of, the defendant duly asked for and was allowed an exception to such ruling and order, except as to assignment of error Number Four, which error occurred in the absence of the defendant and his counsel, and as to assignment of error Number Three the exception was taken to the giving of such instructions in the presence of the jury before the jury retired to consider their verdict.

J. F. O'BRIEN,
Attorney for Defendant.

Copy received this 23d day of October, 1928.
JOHN T. McCUTCHEON,
Assistant United States Attorney.

[Indorsed]: Filed Oct. 24, 1928. [43]

CITATION ON APPEAL.

The United States of America.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco in the State of California, within thirty days from the date hereof, pursuant to an appeal, duly authenticated, and now on file in the office of the clerk of the United States District Court for the Western District of Washington, Southern Division, where James McCormick is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the party in his behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, this 7th day of November, 1928.

EDWARD E. CUSHMAN,
United States District Judge.

Service of the foregoing citation by receipt of a true copy thereof is hereby admitted this 7th day of November, 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney. [44]

ORDER ALLOWING APPEAL.

Now, on this 24 day of October, 1928, came the defendant, James McCormick, by his attorney James F. O'Brien, and filed herein and presented to the court his petition praying for the allowance of an appeal as well as an assignment of errors intended to be urged by him, and also praying that a transcript of the record, proceedings and papers upon which the judgment was rendered, after being duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

IT IS ORDERED, that the said appeal be, and the same is hereby allowed, and the defendant having deposited with the Clerk of this court his bond in the sum of Twenty-five Hundred ($2500.00) Dollars is hereby admitted to bail pending the final determination of said cause upon the appeal.

Done in open court this 24 day of October, 1928.

EDWARD E. CUSHMAN,
Judge.

Service of the foregoing order by receipt of a true copy thereof is hereby admitted this —— day of October, 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

[Indorsed]: Filed Oct. 24, 1928. [45]

[Title of Court and Cause.]

ORDER FIXING TIME TO PREPARE, SERVE AND FILE BILL OF EXCEPTIONS.

This matter coming on to be heard upon the application of the defendant, James McCormick, for an order extending the time within which to prepare, serve, and lodge a bill of exceptions in the above-entitled cause, and the plaintiff being represented by John T. McCutcheon, Assistant United States Attorney, and the defendant by his attorney, James F. O'Brien, and the Court being sufficiently advised in the premises,—

NOW, THEREFORE, for good cause shown, IT IS HEREBY ORDERED that the defendant, James McCormick, may have until the 17th day of November, 1928, at two o'clock in the afternoon, within which to prepare, serve, and lodge with the Clerk of the court his bill of exceptions in said cause.

Done in open court this 13th day of October, 1928.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed Oct. 13, 1928. [46]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Kindly prepare, certify and transmit to the Clerk

of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the typewritten transcript of the record on appeal in the above-entitled cause, eliminating all captions, excepting the original information, to wit:

1. Information.
2. Arraignment and plea of not guilty.
3. Verdict.
4. Motion for new trial.
5. Order denying motion for new trial.

5A. Judgment and sentence.

6. Bill of exceptions.

6A. Order allowing bill of exceptions.

7. Petition for appeal.
8. Assignment of errors.

8A. Citation.

9. Order allowing appeal.

9A. Order extending time to lodge bill of exceptions.

10. Clerk's certificate to transcript.
11. This praecipe.
12. Journal entry of Sept. 28, 1928, sending Exhibit No. 3 to Jury.

J. F. O'BRIEN,
Attorney for Defendant.

304 Puget Sound Bank Building, Tacoma, Washington.

Service of a copy of the foregoing praecipe is hereby admitted this 10th day of November, 1928.

JOHN T. McCUTCHEON,
Assistant United States Attorney.

[Indorsed]: Filed Nov. 10, 1928. [47]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of so much of the record and proceedings in the case of United States of America, Plaintiff, *versus* James McCormick, Defendant, in Cause No. 6415 in said United States District Court, as is required by praecipe of counsel for appellant, filed and shown herein as the originals appear on file and of record in my office in said District at Tacoma.

I further certify that I hereto attach the original citation in this cause with acceptance of service thereon.

I further certify that the following is a full, true and correct copy of all expenses, costs, fees and charges incurred and paid in my office on behalf of said appellant James McCormick, for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making record, certificate, etc., 106 fols. @ 15¢ each	$15.90
Appeal	5.00
Seal	.50

ATTEST my hand and the seal of said District Court at Tacoma, Washington, this 7th day of January, A. D. 1929.

[Seal] ED. M. LAKIN,
Clerk.
By Alice Huggins,
Deputy. [48]

COPY OF JOURNAL RECORD U. S. DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, TACOMA.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division of said District on the 28th day of September, 1928, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said court as follows:

[Title of Cause.]

RECORD OF TRIAL (CONTINUED).

Now on this 28th day of September, 1928, defendant is in court and trial is resumed. * * * Later the jury requests that the wine introduced in evidence be sent into the jury-room and the Court orders that Exhibit No. 3 be given to the jury, and it is so done. * * * [49]

[Endorsed]: No. 5690. United States Circuit Court of Appeals for the Ninth Circuit. James McCormick, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed January 14, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5692

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United States

Circuit Court of Appeals

For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

EMIL JOHNSON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5692

United States
Circuit Court of Appeals
For the Ninth Circuit.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Appellant,

vs.

EMIL JOHNSON,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellant:

ARTHUR C. HUSTON, Esq.,
BUTLER, VAN DYKE & DESMOND, Esqs.,
Sacramento, Calif.

Attorneys for Appellee:

RALPH H. LEWIS, Esq.,
GEORGE E. McCUTCHEN, Esq.,
OTIS D. BABCOCK, Esq.,
Sacramento, Calif.

In the Superior Court of the State of California, in and for the County of Sacramento.

EMIL JOHNSON,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant.

ORDER FOR REMOVAL.

On reading and filing the petition and bond of defendant, Sacramento Suburban Fruit Lands Company, a corporation, for removal of the above-entitled cause to the Northern Division of the United States District Court, in and for the Northern District of California, Second Division, and it

appearing to the Court that written notice of said petition and bond for removal was duly given by said defendant to plaintiff prior to filing said petition and bond, and this matter coming on for hearing, said bond is hereby approved and accepted as good and sufficient.

AND IT IS HEREBY ORDERED that said cause be and the same is hereby removed to the Northern Division of the United States District Court, in and for the Northern District of California, Second Division.

Dated: Sacramento, California, August 20, 1927.

J. R. HUGHES,
Judge of the Superior Court.

[Endorsed]: "Order for Removal." Filed Aug. 20, 1927. [1*]

In the Superior Court of the State of California, in and for the County of Sacramento.

EMIL JOHNSON,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant,

COMPLAINT.

Plaintiff complaining alleges:

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*Page-number appearing at the foot of page of original certified Transcript of Record.

I.

That defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That on and prior to the 27th day of February, 1923, plaintiff was the owner of that certain real property in the County of Hennepin, State of Minnesota, and plaintiff's interest in said real property was worth in excess of Six Hundred ($600.00) Dollars.

III.

That prior to said 27th day of February, 1923, defendant for the purpose of cheating and defrauding plaintiff out of said property and out of said moneys belonging to plaintiff by inducing him to enter into the contract hereinafter referred to falsely and fraudulently stated and represented to plaintiff that all of the real property which defendant was then offering for sale, including Lot 35 of Rio Linda Subdivision 5 as per the official map filed in the office of the County Recorder of the County of Sacramento, State of California, and located in said County of Sacramento, was rich and fertile, was capable of producing all sort of farm products and crops, that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit-trees; that said land was perfectly adapted to the raising of all kinds of fruits; that fruit-trees of all kinds would thrive and flourish thereon and produce an

[2] abundance of fruit of the finest quality. That defendant further stated that the said Lot 35 contained ten acres of land and that said land was of the fair and reasonable market value of Four Thousand ($4,000.00) Dollars.

IV.

That plaintiff had never visited said land and was wholly unfamiliar with the values, characteristics and/or qualities of California lands and was entirely unfamiliar with the growing of fruits and the sort of land adapted to the growing of fruits. That defendant knew that plaintiff was ignorant of the matters necessary to make a proper or wise purchase of California lands or any fruit lands and was ignorant of the value thereof and that plaintiff was relying upon said representations and each of them but nevertheless made said representations and each of them for the purpose of cheating and defrauding plaintiff by inducing him to enter into the contract hereinafter referred to.

V.

That it was not then, there or at all true that said land was of any value in excess of One Hundred and Fifty ($150.00) Dollars and/or that any of said land was fertile and/or would produce any crops in commercial quantities and/or was at all adapted to the growing of fruits or fruit-trees.

VI.

That plaintiff relied upon the representations of defendant and each of them and solely because of his reliance thereon entered into an agreement with

defendant on or about the 27th day of February, 1923, whereby plaintiff agreed to purchase from defendant said Lot 35 of Rio Linda Subdivision 5 at a price of Four Thousand ($4,000.00) Dollars, paid thereon One Thousand ($1,000.00) Dollars by conveying the said real property in Hennepin County, Minnesota, and giving a promissory note for Four Hundred ($400.00) Dollars and agreed to pay the balance in installments of Six Hundred ($600.00) Dollars per year, payable upon the 22nd day of February of each year thereafter. That thereafter defendant agreed to and did waive the strict performance of the covenant to pay Six Hundred ($600.00) Dollars per [3] year and agreed to keep said contract in force if plaintiff would pay Forty ($40.00) Dollars per month thereon. That plaintiff has well and faithfully kept and performed all the other terms, covenants and conditions of said contract on his part to be performed and has kept up said payments of Forty ($40.00) Dollars per month and is ready, willing and able to perform all of the covenants of said contract as modified.

VII.

That plaintiff did not discover the falsity of said representations until the spring of 1927 and prior thereto had expended large sums of money in the improvement of said real property. That plaintiff built chicken-coops thereon at an expense of One Thousand and Fifty ($1,050.00) Dollars; installed a pump plant, tank-house and water system at an

expense of Seven Hundred and Twenty-two ($722.00) Dollars, distributed as follows:

Well	$52.00
Pump Pit	45.00
Pipes	75.00
Pump	300.00
Tank-house	350.00

That during said period, plaintiff planted approximately One Thousand Three Hundred (1,300) grape-vines, about 300 thereof in the year 1926 and 1,000 thereof in the year 1927, and the cost of purchasing and planting said vines was in excess of One Hundred and Fifty ($150.00) Dollars. That plaintiff also planted approximately 65 fruit-trees thereon and cultivated the same and attempted to make them grow and in so doing expended in money and labor approximately Two Hundred ($200.00) Dollars. That plaintiff reconstructed a certain garage upon said lands into a dwelling-house, and the reasonable and actual cost of so doing was approximately One Thousand Two Hundred ($1,200.-00) Dollars. That had said lands been as represented, the bare land would have been worth Four Thousand ($4,000.00) Dollars and upwards and with the improvements placed thereon by plaintiff said property would have been worth [4] not less than Ten Thousand ($10,000.00) Dollars. That said grape-vines has died and said trees are dying and because of the unfertility of said soil said land is not worth in excess of One Hundred and Fifty ($150.00) Dollars, and the said improvements thereon are not worth in excess of Eight Hundred

and Fifty ($850.00) Dollars. That, by reason of the premises, plaintiff has been damaged in the sum of Nine Thousand ($9,000.00) Dollars.

WHEREFORE, plaintiff prays judgment for Nine Thousand ($9,000.00) Dollars, costs of suit and general relief.

RALPH H. LEWIS.
GEORGE E. McCUTCHEON. [5]

State of California,
County of Sacramento,—ss.

Emil Johnson, being first duly sworn, deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

EMIL JOHNSON.

Subscribed and sworn to before me this 9th day of August, 1927.

[Seal] GEORGE E. McCUTCHEON,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: "Complaint." Filed Aug. 11, 1927. [6]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

Now comes defendant, and demurring to the complaint of the plaintiff on file herein, for grounds of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays hence to be dismissed, with its costs of suit herein incurred, and that plaintiff take nothing by his said action.

BUTLER, VAN DYKE & DESMOND.

[Endorsed]: "Demurrer to Complaint." Filed Aug. 20, 1927.

Service hereof is hereby admitted and receipt of copy acknowledged this 19th day of August, 1927.

GEORGE E. McCUTCHEN and
RALPH H. LEWIS,
Attorneys for Plaintiff. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Monday, the 12th day of September, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 12, 1927 —ORDER OVERRULING DEMURRER.

Demurrer to complaint came on to be heard in the above-entitled case. By consent, IT IS ORDERED that said demurrer be and the same is hereby overruled, with leave to answer within 30 days. [8]

[Title of Court and Cause.]

ANSWER.

Now comes the defendant, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows, to wit:

I.

Admits the allegations of Paragraph I of plaintiff's complaint.

II.

Admits that on and prior to the 27th day of February, 1923, plaintiff was the owner of certain real property in the County of Hennepin, State of Minnesota.

III.

Admits that plaintiff had never visited the land described in Paragraph III of plaintiff's complaint prior to making the contract with defendant on or about the 27th day of February, 1923. Concerning the allegations in Paragraph IV of plaintiff's complaint to the effect that prior to the making of

said contract plaintiff was wholly unfamiliar with values, characteristics and/or qualities of California lands, and was entirely unfamiliar with the growing of fruits and the sort of land adapted to the growing of fruits, defendant alleges that it has [9] not sufficient information or belief upon or concerning said allegations to enable it to answer the same, and for that reason and upon that ground denies, both generally and specifically, each and all of said allegations.

IV.

Admits that on or about the 27th day of February, 1923, plaintiff entered into a contract with defendant whereby plaintiff agreed to purchase from defendant Lot 35 of Rio Linda Subdivision No. 5 at a price of $4,000.00, and paid thereon the sum of $1,000.00, by conveying real property in Hennepin County, Minnesota, but in this connection defendant alleges that although plaintiff received a credit upon the purchase price of said lands of $1,000.00 in consideration of the conveyance to defendant of said property in Hennepin County, that the actual value of said property did not exceed the sum of $———. Admits that plaintiff gave to defendant a promissory note for $400.00, and agreed to pay the balance of the purchase price of said land in installments of $600.00 per year, payable on the 22d day of February each year thereafter. Admits that defendant agreed to and did waive the strict performance of the covenant to pay $600.00 per year, and agreed to keep said contract

in force if plaintiff would pay $40.00 per month thereon.

V.

Admits that plaintiff built upon said property chicken-coops and installed a pump plant, tank-house and water system. Concerning the allegations in Paragraph VII of plaintiff's complaint that plaintiff expended $1,050.00 in the building of chicken-coops; $722.00 in the installation of a pump plant, tank-house and water system, and that during said period plaintiff planted approximately 1,300 grape-vines, about 300 thereof in the year 1926, and 1,000 thereof in the year 1927, and that the cost of purchasing and planting said vines was in excess of $150.00, [10] defendant alleges that it has not sufficient information or belief upon or concerning the said allegations to enable it to answer the same, and, therefore, for that reason and upon that ground it denies each and all of said allegations. Admits that plaintiff also planted approximately 65 fruit-trees on said property, and reconstructed a garage into a dwelling-house. Concerning the allegations in Paragraph VII of plaintiff's complaint to the effect that plaintiff expended in money and labor approximately $200.00 in planting fruit-trees and cultivating the same, and the sum of $1,200.00 in reconstructing the said garage into a dwelling-house, defendant alleges that it has not sufficient information or belief upon or concerning the said allegations to enable it to answer the same, and for that reason and upon that ground it denies, both

generally and specifically, each and all of said allegations.

VI.

Defendant denies each and all of the allegations of plaintiff's complaint not hereinabove denied for want of information or belief, or not hereinabove expressly admitted.

As a further defense to plaintiff's action herein, defendant alleges:

That this action and cause of action is barred under the provisions of Section 338 and of Subdivision 4 thereof of the Code of Civil Procedure of the State of California.

WHEREFORE, defendant prays that plaintiff take nothing by his said action herein, and that defendant have and recover of and from plaintiffs its costs of suit herein incurred.

BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [11]

State of California,
County of Sacramento,—ss.

L. B. Schei, being duly sworn, deposes and says:

That he is an officer, to wit, the resident secretary of Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the within entitled action; that he makes this affidavit for and on behalf of said corporation defendant; that he has read the foregoing and annexed answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters

as are therein stated upon information or belief, and as to such matters he believes it to be true.

L. B. SCHEI,
Resident Secretary.

Subscribed and sworn to before me this 13th day of October, 1927.

[Seal] A. E. WEST,
Notary Public in and for the County of Sacramento, State of California.

Service hereof is hereby admitted and receipt of copy acknowledged this 13 day of October, 1927.

RALPH H. LEWIS,
GEO. E. McCUTCHEON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 13, 1927. [12]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Friday, the 14th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge, for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 14, 1928 —TRIAL.

This case came on regularly this day for trial. Geo. E. McCutchen, Esq., Ralph Lewis, Esq., and Otis D. Babcock, Esq., appearing as attorneys for the plaintiff and Arthur C. Huston and J. W. S. Butler, Esq., appearing as attorneys for the defendant. Thereupon the following named persons, viz.:

A. J. Nevis,	C. E. Anabel,
John Hoesch,	G. R. Stephen,
Ray C. Flory,	Leo Laskie,
L. C. Pillsbury,	Alexander Furness,
J. W. Neeley,	J. R. Lottermose, and
A. L. Young,	Charles Phillips,

twelve good and lawful jurors, were after being duly examined under oath sworn to try the issues joined herein. Counsel for both sides made their opening statements to the Court and jury. Emil Johnson, Bettie Johnson, Charles T. Tipper, R. B. Loucks, Howard D. Kerr, Julius Hogan and Herbert C. David were duly sworn and testified in behalf of the plaintiff, and plaintiff introduced in evidence and filed his exhibits marked Nos. 1, 2, 3, 4, 6 and 7, and the plaintiff rested. F. E. Unsworth, John Posehn, H. F. Bremer, H. M. Edmunds, J. S. McNaughton, Lambert Hagel, E. P. Verner, R. O. Bolden, Louie [13] Louie Turkelson, F. E. Twinning, E. H. Traxler, Arthur Mor-

ley, O. W. Jarvis, L. B. Schei, E. E. Amblad and M. A. Crinkley were sworn and testified on behalf of the defendant, and the defendant introduced in evidence and filed his exhibits marked Nos. 5, 5½, 8, 9, 10, 11 and 12, and the defendant rested. Carrie Klaffenbach and Jacob M. Johnson were called in rebuttal and testified on behalf of the plaintiff and Emil Johnson was recalled in rebuttal and testified on behalf of the plaintiff. Counsel for both sides made their arguments to the Court and jury at the conclusion of which IT WAS ORDERED that the further trial hereof be continued to Saturday, September 15th, 1928, at 9:30 A. M. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Saturday, the 15th day of September, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable GEORGE M. BOURQUIN, District Judge, for the District of Montana, designated to hold and holding this court.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 15, 1928 —TRIAL (RESUMED).

The parties hereto and the jury impaneled herein being present as heretofore the trial was thereupon

resumed. After the instructions of the Court to the jury, the jury at 10:20 o'clock A. M. retired to deliberate upon their verdict. At 11:00 o'clock A. M. the jury returned into court and upon being asked if they had agreed upon their verdict, replied in the affirmative, and returned the following verdict which was ORDERED recorded, viz.:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Eighteen Hundred and Fifty Dollars ($1850.00) Dollars.
>
> CHAS. A. PHILLIPS,
> Foreman."

and the jury being asked if said verdict as recorded is their verdict, each juror replied that it is. ORDERED that judgment be entered in accordance with said verdict, the amount of said verdict to apply on the amount of money the plaintiff now owes the defendant, said amount to be hereinafter fixed by the Court. FURTHER ORDERED that the jurors especially called in to try this case be excused from further attendance upon this Court. ORDERED that Juror L. C. Pillsbury be excused until Monday, September 17th, 1928. [15]

[Title of Court and Cause.]

VERDICT.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the

sum of Eighteen Hundred and Fifty *Dollars* ($1850.00) Dollars.

CHAS. A. PHILLIPS,
Foreman.

[Endorsed]: Filed Sept. 15, 1928, at 10 A. M. [16]

In the Northern Division of the United States District Court for the Northern District of California.

No. 425—LAW.

EMIL JOHNSON,

Plaintiff,

vs.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 14th day of September, 1928, being a day in the April, 1928, Term of said Northern Division of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein, Geo. E. McCutchen, Esq., Ralph Lewis, Esq., and Otis D. Babcock, Esq., appearing as attorneys for the plaintiff, and Arthur C. Huston, Esq., and J. W. S. Butler, Esq., appearing as attorneys for the defendant; and the trial having been proceeded with on the 14th and 15th days of Sept., 1928, in said Term, and evidence, oral and

documentary, upon behalf of the respective parties having been introduced and closed and the cause after arguments of the attorneys and the instructions of the Court having been submitted to the jury, the jury having subsequently rendered the following verdict, which was ORDERED recorded, to wit:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Eighteen Hundred and Fifty *Dollars* ($1850.00) Dollars.
>
> CHAS. A. PHILLIPS,
> Foreman,

and the Court having ORDERED that judgment be entered in accordance with said verdict:

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,— [17]

IT IS ORDERED AND ADJUDGED that the plaintiff Emil Johnson do have and recover of and from the defendant Sacramento Suburban Fruit Lands Company, a corporation, the sum of Eighteen Hundred and Fifty ($1850.00) Dollars, and for costs taxed at $30.85. FURTHER ORDERED that the amount of verdict apply on amount of money the plaintiff owes defendant, the amount to be hereinafter fixed by the Court.

Judgment entered this 15th day of September, 1928.

WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [18]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the Northern District of California:

Now comes the defendant, Sacramento Suburban Fruit Lands Company, a corporation, by its attorneys, and respectfully shows:

That the defendant, feeling aggrieved by the verdict and judgment thereon in said cause rendered on the 15th day of September, 1928, in favor of plaintiff and against defendant, for the sum of One Thousand Eight Hundred Fifty ($1,850.00) Dollars, damages, with costs amounting to Thirty and 85/100 ($30.85) Dollars, hereby petitions the Court for an order allowing the defendant to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and that a citation be issued as provided by law, and that a transcript of the record upon which said judgment was based be sent to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that all further proceedings in this court be suspended and stayed until the determination of the appeal, and that an order be made fixing the amount of surety which said defendant shall give upon this appeal.

Dated: October 24th, 1928.

ARTHUR C. HUSTON,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant. [19]

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of October, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
OTIS D. BABCOCK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 24, 1928. [20]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the Sacramento Suburban Fruit Lands Company, a corporation, the defendant in the above-entitled cause, and makes and files the following assignment of errors, upon which it will rely in its prosecution of the appeal from the verdict and the judgment thereon, herein made and entered on the 15th day of September, 1928, in favor of the plaintiff and against this defendant:

I.

The Court erred in sustaining an objection to questions asked the witness, H. M. Edmunds, as follows:

"Q. Are you acquainted with the location in which the property of Emil Johnson is situated? A. Yes, sir.

Q. You know that general district?

A. Yes, sir.

Q. Do you know the Johnson property, in particular? A. No, sir, I do not.

Q. But the general district and location, you are familiar with some of the properties out there? [21] A. Yes, sir.

Q. And have been familiar with it since February 27th, 1923? Have you been familiar with that district in which that Johnson property is located since that time? A. Yes, sir.

Q. Do you know the value of land out there for the purposes for which they are adapted, reasonable market value? A. Yes, sir.

Q. What in your opinion would be the value of land in the district in which the Emil Johnson property is located in the month of February, 1923?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid.

The COURT.—I hardly think the competency of the witness has been shown. Objection sustained.

Mr. BUTLER.—Exception. That is all."

II.

The Court erred in sustaining an objection to questions asked Lambert Hagel, as follows:

"Q. Do you know the location of the Emil Johnson place?

A. I have been going by many times, and I don't know—

Q. You know where it is?

A. I know where it is.

Q. You know the district where it lies generally? A. Yes, sir. [22]

Q. How far from your place?

A. About a mile and a half.

Q. Do you know any reason why you cannot raise fruit and vegetables and grape-vines on that soil the same as you have on yours with proper attention?

Mr. McCUTCHEN.—Objected to. I don't think the question—he says, "Do you know any reason" why he couldn't.

The COURT.—Sustained. He says he doesn't know anything about it.

Mr. BUTLER.—Exception. That is all."

III.

The Court erred in sustaining an objection to a question asked E. M. traxler as follows:

"Q. Comparing again the lands in the Arcade Park District, what were those lands sold for?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial.

Mr. BUTLER.—Withdrawn. What was the reasonable value of that land on an acreage basis, in the Arcade Park section?

Mr. McCUTCHEN.—Same objection. He is cross-examining his own expert.

Mr. BUTLER.—I think I have the right—that is withdrawn.

Q. Do you have in the Arcade Park District any advantages which they have in Rio Linda?

Mr. McCUTCHEN.—The same objection. [23]

The COURT.—Sustained.

Mr. HUSTON.—Exception."

(The witness had previously testified: "Q. During the time that you were with the Ben Leonard Company they were the owner of a tract of land in the immediate vicinity of Rio Linda, were they not? A. Yes, sir, south.

Q. Next adjoining the colony to the south?

A. South of Rio Linda.

Q. And you were familiar with that tract of land that is known as the Arcade Park District?

A. Yes, sir.

Q. Now, let me ask you if you were familiar with sales of lots in the Arcade Park District?

A. Yes, sir, sold a good many.

Q. How do the conditions there as to depth and quality of soil compare with the depth and quality of soil throughout the Rio Linda District?

A. About the same depth.")

IV.

The Court erred in striking out part of the testimony of M. A. Crinkley as follows:

"Q. You say that this land cost $85 and $100 an acre. As a matter of fact, wasn't that

bought years before you became connected wtih the company?

A. I already testified it was bought in 1911 and I became identified with the company in 1915. [24]

Q. You didn't have anything to do with the sale? You weren't there when they made the transaction?

A. I wasn't there when they purchased the land.

Q. All you know about it is what somebody tells you? A. Let me finish my answer.

Q. Of your own knowledge.

A. Yes, I know all about it.

Q. How do you know?

A. Mr. McCutchen, I came out in the year 1916 and paid to the Sacramento Valley Development Company several hundred thousand dollars in cash, and if a man doing that doesn't know about the transaction, I don't know—

Q. You don't know of your own knowledge what had been paid him?

A. If I don't, how would I know how much to pay him in 1916?

The COURT.—Don't argue.

The WITNESS.—Now, your Honor, it is not fair—

The COURT.—He is asking you if what you knew, you knew by hearsay.

A. No, sir, it is hardly hearsay.

The COURT.—No argument.

Mr. McCUTCHEN.—I move to strike his testimony as to what was paid for the land.

The COURT.—It will be stricken.

Mr. HUSTON.—Exception.

V.

The Court erred in instructing the jury on the question of representations alleged to have been made by defendant. [25]

VI.

The Court erred in instructing the jury that the alleged representations induced plaintiff to buy.

VII.

The Court erred in refusing to give defendant's proposed instruction on the question of intent, reading as follows:

> "The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud. It must appear from a preponderance of the evidence that the false representations, if any, were made by defendant with a fraudulent intent, and for the purpose of inducing the plaintiff to act upon them."

VIII.

The Court erred in instructing the jury as follows:

> "So if you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff, and influenced him to buy, then you proceed to the next step,

which is: Did the defendant know of the falsity of the representations, if they were false, which we will come to later? In these books they represented that it was already proven that the land was adapted to the commercial raising of fruit. There they state it as a fact. If it was not, it ought to be inferred that they knew, because they had every opportunity to know. The land was there. Moreover, if they didn't know it was false, all under [26] the circumstances, considering their relation to the land and their opportunities and their general knowledge, if they ought to have known, it is the same thing as if they did know, because no one inducing another to enter into a bargain can make a positive assertion of fact contrary to the truth if they are culpably negligent in not knowing the truth, and I think you will agree the defendant was in this particular case. That is for your judgment, moulding it by what you would know or ought to know in like circumstances if you were in the position of a company thus handling and dealing with lands over a period of ten years."

IX.

The Court erred in instructing the jury on the question of the statute of limitations and in refusing to give the instruction on that subject proposed by defendant.

To all of which the defendant duly and regularly excepted.

WHEREFORE, defendant prays that said judgment be reversed and held for naught, and that defendant be restored to all which it has lost by reason of said verdict and judgment.

BUTLER, VAN DYKE & DESMOND,
ARTHUR C. HUSTON,
Attorneys for Defendant and Appellant.

Service hereof is hereby admitted and receipt of copy acknowledged this 24th day of October, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
OTIS D. BABCOCK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 24, 1928. [27]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 14th day of September, 1928, the above-entitled cause came regularly on for trial before Hon. George M. Bourquin, Judge of said District Court, and a jury impaneled and sworn to try said cause and the issues presented by the complaint of the plaintiff and the answer of defendant, plaintiff appearing by his attorneys, George E. McCutchen and Otis D. Babcock, and the defendant by its attorneys, J. W. S. Butler and Arthur C. Huston; and thereupon the proceedings taken, the evidence given, the objections made, the rulings thereon and the exceptions thereto were as follows:

TESTIMONY OF EMIL JOHNSON, IN HIS OWN BEHALF.

EMIL JOHNSON, plaintiff, as a witness in his own behalf, testified:

In 1922 and '23 I lived in Minneapolis. By occupation I was a carpenter. I had never been to California and had never been in the business of raising fruit, and knew nothing about fruit-raising. [28]

About the latter part of 1922 I had some dealings with the defendant corporation. Mr. Amblad came to my house and told me Mr. Bean had bought twelve thousand acres in Rio Linda for the purpose of making homes for poor people; that Mr. Bean was a rich man and a very religious man. The places in Rio Linda were the sort of places for poultry and orchards. The land was specially well adapted for raising all kinds of fruit in commercial quantities. He said it produced large fruit of good quality in commercial quantities. He told us the land was valued from four hundred dollars an acre to four hundred fifty dollars and more.

I talked four times to Mr. Amblad. The first conversation was at my home. He gave me a book like that.

(The book, described as a copy of the Second Edition, was received in evidence and marked Plaintiff's Exhibit 1.)

I read the book and I believed the things Mr. Amblad told me, and I signed a contract to buy some of that land at four hundred dollars an acre.

(Testimony of Emil Johnson.)

I first came to California the 18th of May, 1923. Before leaving he had told me that there was a power line right on the corner and ready to hook up for the pump, and after I bought I happened to go to the office and I ran into Mr. Amblad's office and Mr. Whitcomb was there and I told him, and then I asked them what the red line was as marked on the blocks, and he said that was the power line, so I told them my lot is thirty-two in New Prague Subdivision, and that line did not go there, and I asked them about it. He said that is as far as the power line goes. I said Mr. Amblad told me the power line was right on the corner. [29]

WITNESS.—The contract provides that we could make an exchange.

(The first contract was received in evidence and marked Plaintiff's Exhibit 2.)

I saw Mr. Schei when I came here and finally selected another piece, described as Lot Thirty-five, Subdivision Five. We signed a new contract some time in the summer—some time in June.

(The contract of February 27, 1923, was admitted in evidence and marked Plaintiff's Exhibit 3.)

We looked at the second piece of land for probably a couple of hours before I signed up. The second piece of land was valued at three hundred fifty dollars an acre. Mr. Schei told me that before Mr. McNaughton took me out. There was a garage valued at four hundred fifty dollars on it, and the boring of the well was fifty dollars. I did

(Testimony of Emil Johnson.)

not make any further investigation, and signed up right away. Before I moved on the piece I started to improve it. I made a house out of the garage and moved on it that summer.

Back in Minneapolis no one had told me anything about hard-pan. Before I exchanged, when I talked to Mr. Schei and Mr. McNaughton, no one said anything about hard-pan. After that, Mr. McNaughton said the hard-pan was not injurious to the trees and was good, and beneficial, and supposed to keep the drainage. I was digging my pit and I asked him what the hard-pan was, and he said that stuff there was hard-pan and that it was good for fertilization and for drainage, to keep the moisture in the roots. I believed that and planted about sixty-five trees in 1924. The first year they seemed to do pretty good. In 1925 one died. In 1926 two died. In 1927 fourteen died. Two died this year. I gave those trees [30] the best of care, plowed and irrigated and sprayed them. The trees that are still there look very poor and runty. They are bearing some fruit, about twenty--five, thirty or fifty peaches to a tree, just a little bit of a thing. A little plums on some of the plum trees, smaller than an ordinary plum.

I planted some grapes in 1926 and more in 1927. Altogether, about thirteen hundred twenty-five vines. Probably about half of them did well. About three hundred fifty died. The rest are alive, some are doing well and some are not.

(Testimony of Emil Johnson.)

I paid six hundred dollars and four hundred dollars in cash and forty dollars up to August second. When I first came here I didn't pay anything.

Cross-examination.

I was not acquainted with Mr. Amblad or anyone connected with the company before I discussed the land with them. I had never had any business relations with any of them. Mr. Amblad first attracted my attention to the Rio Linda colony. Before I signed the contract I learned that I had some acquaintances who were then living at Rio Linda. One was Mr. Olsen and Mr. Bolding. Mr. Bolding had been a neighbor of mine in Minneapolis, and when Mr. Amblad came to my place and told me he was there, he pointed out in the pamphlet a picture of Mr. Bolding's place. I did not correspond or communicate with Mr. Bolding or anybody before coming to California. I think my wife wrote to Mrs. Olsen. She had been acquainted with her in Minneapolis. I hardly knew her myself. I don't think my wife received any reply to the letter. I don't know whether or not she wrote to Mr. Bolding.

When we arrived in California we were taken out to the colony by Mr. Schei. The first time he took me to Fisher's orchards. [31] I found a commercial orchard there. Then to Mr. Blocker's, where I found some orchards and a chicken-coop. Then over to Vineland, where I met Mr. Case and Jacob Johnson. I saw Mr. Fisher but did not

(Testimony of Emil Johnson.)

speak to him. I saw Mr. Sherfenberg the first day. I cannot recall how many places Mr. Schei took me the first day. We were riding around from one place to another.

To some extent the statement of Mr. Amblad about the power line was one of the things that influences me in buying this property. I don't know whether I would have bought it if I had not thought the power was there or not. I found that statement was not true before I left Minneapolis.

Before Mr. Amblad came to see me I had not sent any communication to the office. Mr. Amblad came to see me first. I don't remember whether the first trip to Rio Linda was on Saturday. I was out there on the Sunday following.

After I visited Mr. Bolding and Mr. Olsen I was taken over the colony by Mr. McNaughton. He showed me but two lots. I didn't find any fault. I just didn't like the location. I didn't go round with anyone else before I finally picked out the place I own.

I did not discuss the final selection of the lot that I took with any of the settlers in the colony. I did not talk it over with Mr. Bolding, or Mr. Olsen. I may have asked them a little about the colony—how they liked it. I don't think I asked anybody I met there about the fruit. I did not ask a single settler about the fruit. I only asked Mr. Schei. I asked Mrs. Olsen to a certain extent because she had fruit. She didn't tell me anything. I did not ask them anything about the soil. I didn't ask

(Testimony of Emil Johnson.)

about poultry. She was talking about poultry. I asked Mr. Bolding about poultry. He said they were doing pretty [32] well. I discussed the land and the colony with Mr. Bolding or Mr. Olsen a couple of times before I made my selection.

I put improvements on the land I finally selected right after I bought it. I have been on that land ever since I arrived in California, only I stopped on the other side probably a month.

I didn't plant anything the first year, but I did engage in the poultry business. The second year I planted some fruit-trees of quite a few different varieties. Before I planted I blasted for two trees, where the hard-pan was about twelve inches deep. I learned that hard-pan was on those lands for the first time while digging the pit, which was about two or three days after my arrival.

After my talk with representatives of the Company in the east I had in my mind the picture that the Rio Linda colony was principally devoted to raising orchards. When I came out here I actually found probably a small part of it devoted to raising orchards.

Now, as to the care of the place and cultivation, I have plowed it and disced and water it. Every time I water it I hoed around the trees. I don't water the vines, except the Thompson Seedless. Beside plowing and discing and hand-hoeing, I have sprayed the trees every year. I didn't give them any other cultivation. Last year I plowed and disced and hoed. In this year, 1928, I plowed in

(Testimony of Emil Johnson.)

the spring and disced the orchard and hoed them after they were watered.

I don't suppose my orchard is of a producing age. I don't know anything about trees and the production of fruit in commercial quantities, so I can't tell you that when I arrived here I found any orchard in Rio Linda which appeared to be producing fruit in commercial quantities. They showed me around the creek bottom land. [33] We went by Mr. Holmquist's and Mr. Quirk's cherry orchards, and we drove slow through the ground, and then he took us to Fisher's. I did not understand that there was a difference between creek land and upland. I did not know the difference when I came here. I understood the colony as a whole was all about the same, well adapted for raising fruit.

Q. And now I will ask you once more and then leave it alone. When you arrived here, where did you find any orchard in the Rio Linda district which loked to you like they were producing fruit in commercial quantities?

A. I couldn't tell you because on the Fisher and the creek bottom place Hornbrocker.

Q. How many acres did they cover?

A. I don't know.

Q. Small acres? Ten acres or such? Small orchards? A. I guess it is more.

Q. How many?

A. Possibly ten or twenty, I don't know.

Q. Outside of that when you arrived here did you

(Testimony of Emil Johnson.)

find any orchards that looked to you like they were producing fruit commercially?

A. At that time I didn't see any others, because he didn't show me anything else.

Q. During the year after your arrival did you see any orchard on this colony which looked to you like they were producing fruit in commercial quantities?

A. Well, down on the creek bottom.

Q. And about how many acres?

A. I don't know how many acres,

Q. Five hundred or two hundred?

A. I don't know.

Q. Outside of what you saw on the creek bottom, you didn't see any orchards on the Rio Linda colony that looked to you like they were producing fruit in commercial quantities during the first year you were here?

A. I went by Fisher's place and the Terkelson place. [34]

Q. I mean outside of the places that you mentioned? A. That's what I say.

Q. That's all you saw?

A. Some other. Those I saw around there.

WITNESS.—I planted wine grapes. I don't know how the soil on my place compares with the soil on the Lambert Hagel place. I have never been on the Lambert Hagel place, or on John Posehn's I have not been on any place in Rio Linda where the vines are now growing healthy and producing grapes. I have in other districts.

(Testimony of Emil Johnson.)

Redirect Examination.

As to the power line, back in Minneapolis Mr. Whitcomb said there was a mistake of Mr. Amblad. He said probably Mr. Schei can arrange so I get power line over to Lot Thirty-two.

This is a picture of my place taken last winter in February.

(The picture was received in evidence and marked Plaintiff's Exhibit 4.)

Recross-examination.

Mr. HUSTON.—Q. This picture that you have introduced in evidence is a picture taken by pointing a camera at one corner of your property that happened to be under water?

A. Absolutely no.

Q. I call your attention to this picture which purports to be taken August 25th, 1927 and ask if that represents the condition there?

A. Well, maybe it is.

Q. Is that the land in that picture, the land that you say you properly cared for last August?

A. Yes, that is the soil, the weeds growing up between the cultivation. [35]

Mr. HUSTON.—We offer this.

(Whereupon the exhibit was received in evidence and by the Clerk marked Defendant's Exhibit 5.)

TESTIMONY OF MRS. BETTY JOHNSON, FOR PLAINTIFF.

Mrs. BETTY JOHNSON, a witness for the plaintiff, testified:

I am the wife of Emil Johnson. We lived in Minneapolis in the early part of 1923. When Mr. Amblad called I was at home and heard a conversation about land in Rio Linda. He showed us different pictures—beautiful pictures of different trees and fruits and things like that. They looked very nice to us and we thought it was wonderful, and he said we could do the very same thing; that we would have a wonderful home in a short time. The soil was very rich and fertile, that we could raise anything that grows in California, and we had a little money and we said we didn't want more than five acres. He said we would have to have ten acres in order to have a commercial orchard, and there was no reason but that we would succeed. We certainly believed that. We owned a piece of real estate worth six hundred dollars that was traded in on our contract, and came to California and moved on this place.

I was present when the trees were planted. Mr. McNaughton planted the first tree. He showed us how to plant every tree and we did according to just what he said. We have given them the very best care and I have worked out there around them. They are not doing well at all.

TESTIMONY OF CHARLES T. TIPPER, FOR PLAINTIFF.

CHARLES T. TIPPER, a witness for plaintiff, testified: [36]

I have lived in Rio Linda five years. I came from Winnipeg, Canada. In 1923 I was back in Winnipeg and had never been in California. I went to the office of an agent of the Sacramento Suburban Fruit Lands Company. He told me practically the same as I had already read in the book—that it was a fine opportunity to get away from the printing business, which I wanted, and get into a land where I could grow fruit. He said the land was adapted to fruit-raising, that they could grow most anything in Rio Linda in commercial quantities.

I bought some of the land, planted my family orchard and then set out three hundred eight fig trees. Mr. McNaughton advised and assisted me in planting, which I did as he told me.

The soil varies in depth. In putting out the trees I used the ordinary spade and shovel for digging holes, and I just had to break ten or twelve of them with a crowbar on the bottom so it would average around two foot six. I didn't blast for the figs. Mr. McNaughton said it wasn't really necessary to blast; that a lot of them followed the principle of blasting between the rows a couple of years later to be sure of drainage. I have cultivated the trees since then and they have done good, bad and

(Testimony of Charles T. Tipper.)

indifferent. In the spring of this year there were seventy-six dead out of three hundred and eight. Quite a number of those have been replanted. Some of the others are in good shape, and peter out in different sections.

I think the depth of the soil has all to do with it. Where hard-pan is closer to the surface there are places where trees will grow.

I didn't do any blasting between those trees. I blasted in my family orchard. It didn't make any difference. I have had eight or ten trees die there. [37]

Cross-examination.

In my conversation with the representatives of the company before the purchase, the subject of poultry was just casually discussed. We talked poultry over, not extensively. I have had some experience in poultry, just a family flock, at home.

The thing that appealed to me was that I could buy five or ten acres of this land and come down here and engage in the commercial planting of fruit, and that would be sufficient to maintain me and my family. They told me that they had been engaged in colonization of these lands for several years. He didn't specify the age of the orchards. He said the colony was being rapidly built up and populated. I don't know that he told me that there were any orchards on the colony which were at that time devoted to the production of commercial fruit. He showed me pictures of orchards. He did not at that time in any of those conversations make any

(Testimony of Charles T. Tipper.)

statement to me with reference to any commercial orchards on the colony. When I came here I expected to find orchards devoted to the commercial production of fruit on the colony. I expected the orchards would be well advanced.

Mr. HUSTON.—Q. Within a year after you arrived here did you find any five or ten acre orchards in this colony which you undertsood were devoted to the commercial production of fruit?

A. No.

Q. What is the answer? A. No.

Q. You are a plaintiff in a similar action, are you not? A. I am.

Q. And are you contributing any money toward the maintenance of this action?

A. Not directly.

Q. Indirectly?

A. In the way that we are all contributing. [38]

TESTIMONY OF R. B. LOUCKS, FOR PLAINTIFF.

R. B. LOUCKS, a witness for plaintiff, testified:

I live in Rio Linda Subdivision six. Before I came here I lived at Amery, Wisconsin, where I had dealings with the Sacramento Suburban Fruit Lands Company. At that time I had never been to California and knew nothing about fruit-raising.

I got in touch with the agent, Mr. Whitcomb. He said they had bought twelve thousand out of forty-four thousand acres in Rio Linda, which they were

(Testimony of R. B. Loucks.)

cultivating and selling in small lots, fruit lands adapted to all kinds of fruit, very good lands, in fact, as good as there was in California, and people out here start in with chickens and fruit. He told me it was worth three hundred fifty dollars an acre. I came to California, bought some land, planted trees. The trees were planted in the spring of 1924. I cared for them. I lost a few that year, due to grasshoppers eating them, but didn't lose any more to amount to anything. In the spring of 1927 I lost twelve trees out of between fifty and sixty. One end of my orchard has soil about three and a half feet deep, then it runs down shallower to approximately a foot and a half. The character of the trees, according to the depth of soil, is very noticeable. Where I have good soil I have two rows of trees. They are about twice the size as the trees are where the ground is shallow. The larger trees on the good soil produce fruit, but not very much.

Cross-examination.

I first moved here in October, 1923. I am a plaintiff in a similar action, and am contributing to the expense of maintaining these actions.

I recognize the letter and signed the original of that [39] letter on the date that it bears.

(The letter was received in evidence and marked Defendant's Exhibit 5½.)

That letter was in my handwriting. I copied it from a letter I received from the company. Mr.

(Testimony of R. B. Loucks.)

Braughler delivered it to me. I had nothing to do with the preparation of that letter.

Q. I will ask you how the company knew about this statement: "Why, my weekly checks are larger than my monthly checks back east with half the work."

A. I don't know whether that statement was true or not.

I may have informed somebody connected with the company before the letter was written as to what my checks were.

I may have retracted the statements contained in that letter. I don't remember. I don't remember testifying that I never retracted anything.

Q. Have you ever at any time addressed any communication or said anything to the company that you retracted or withdrew any statement contained in that letter? A. To the company?

Q. Yes. A. I don't remember of it.

Q. And you filed suit on what date?

A. I don't know the exact date.

Q. Some time in 1927? A. Yes.

Q. And you have been living at the colony ever since? A. Yes.

Mr. HUSTON.—That's all.

Redirect Examination.

The letter, as near as I can remember, was written about the time it is dated in 1925. At that time I had not discovered [40] that the land was not

(Testimony of R. B. Loucks.)

adapted to the growth of fruit-trees. I thought the land was all right and the company was all right.

Recross-examination.

Mr. HUSTON.—Q. When did you discover this was not right?

A. I didn't discover at all. It turned out there was several things—

Q. (Interrupting.) When did you first have your suspicions aroused?

A. About the last of September or the first of October, 1925.

Q. And your suspicions continued to get worse?

A. There were several things came up after that.

Q. And as you have testified, you never addressed the company on that? A. I spoke to them.

Q. Whom did you speak to about this letter?

A. Nothing about the letter.

TESTIMONY OF HOWARD D. KERR, FOR PLAINTIFF.

HOWARD D. KERR, a witness for plaintiff, testified:

I am a real estate broker and have been so engaged for twenty years, and have had experience in country lands in this county. I know the value of country lands generally in this county in 1923, particularly in the month of February. I am familiar with the Rio Linda district. I don't know of any particular sales out there. I know of sales of similar land around the county.

(Testimony of Howard D. Kerr.)

I have examined the land of Emil Johnson, described as Lot Thirty-five, Rio Linda Subdivision Five. I am able to tell [41] what was the reasonable market value of that land on the 27th day of February, 1923, and I would say that a third of it was fifty dollars an acre, and two-thirds seventy-five dollars an acre.

Cross-examination.

In expressing this opinion as to value of the property I considered that the land could be used for a home by a man who wanted to raise a little diversified crops, such as vegetables, chickens and hay. I took into consideration that fruit-trees could be produced there on about six acres if the land was properly blasted and the trees properly cared for and that this land was adaptable to poultry raising. I don't know anything about the advantages the land might have by reason of the poultry association there and the service that went with it. I didn't take into consideration any advantages the land might have by reason of service from the company in connection with fruit culture.

I do not believe the lands in Rio Linda colony have increased in price from 1912 to the date at which you fixed this value. It might have increased over in the town site on the highway.

Yesterday I testified in regard to a tract of land known as the Jensen tract. That is south and east of this place, I would think, about half a mile, maybe more. I don't think the lands in Rio Linda colony have increased or decreased in value since

(Testimony of Julius Haugen.)

1912, because I *don't there* has been any cause to make them increase. This section of the colony is just the same as 1912 as to value. No matter what advantages. There might be roads and power. I don't know the condition of this particular piece of land in 1912, nor in 1911.

TESTIMONY OF JULIUS HAUGEN, FOR PLAINTIFF.

JULIUS HAUGEN, a witness for plaintiff, testified: [42]

Before I came to California I lived in Williams County, North Dakota. I had never been to California and knew nothing about California fruit-raising.

In 1923 I had some dealings with the Sacramento Suburban Fruit Lands Company, with an agent named Fotheringham. I had received some literature. Mr. Crinkley and Mr. Fotheringham told me about the climate out here and the land, and that it was adaptable for raising any kind of fruit in commercial quantities, except lemons and oranges. I don't remember that they said anything about the depth of soil or presence of absence of hard-pan. They said it was fine fruit. They said the value of the land was three hundred fifty dollars an acre.

I bought some of the land and came here, arriving the last of November, 1923. In 1924 I planted some trees on the land I bought. Where I planted the trees the soil was between three and four feet in

(Testimony of Julius Haugen.)

depth. I consulted with Mr. McNaughton and he showed me how to plant the trees and I planted them the way he said. I took care of them. I planted what is called a family orchard, thirty-four, I think. The next year they did well and the next year too. The next year, not so bad, only the cherry trees died. Out of the bunch I have one tree that looks good to me, and that is a fig tree. The others don't look so good.

Cross-examination.

I took possession of my property in December, 1923. When I arrived I engaged in the poultry business because I had a hundred and fifty chickens with me.

The top soil on my piece of land where I have the orchard is between three and four feet in depth. The shallowest is about [43] five inches. There is just a spot where the plow will hit the hard-pan. I could not say what is the average depth. I haven't tested it all over.

I asked Mr. McNaughton if I should blast for the trees and he said it wasn't necessary. If I found some place that was shallow I could blast later on.

I am one of a group that are bringing suits against this company.

In 1925 I blasted for putting down a pit. I found hard-pan before I dug the pit, but I never blasted it. The first time I found hard-pan was when Mr. Loucks plowed for me. He broke a plow. I believe that was in 1924.

TESTIMONY OF HERBERT C. DAVIS, FOR PLAINTIFF.

HERBERT C. DAVIS, a witness for plaintiff, testified:

I am an agricultural specialist. I entered the University of California and studied agricultural chemistry, went into the army before completing my course. After that I was seven years manager for the United Orchards Company at Antelope. There we did fruit-raising and tested soils. I have been for three years and a half engaged with the firm of Techoe & Davis, and during that time have had occasion to test soil and examine tracts of land to recommend proper planting on them.

I have examined the Johnson place and made borings out there and determined the depth of soil.

I made the chart that you show me. The figures from one to twelve indicate separate borings. The other figures in parentheses indicate depth in inches to hard-pan. The cross-section at the bottom gives a correct representation.

(The chart was received in evidence and marked Plaintiff's Exhibit 6.) [44]

Above hard-pan part of the soil on the tract is a red sandy loam, and part is a grayer type, approaching what they term a 'dobe type. Clay is shown an average of four or five inches over the hard-pan over the whole tract. The clay is computed as part of the surface soil.

I examined the hard-pan itself and took samples.

(Testimony of Herbert C. Davis.)

(The samples were received in evidence and marked Plaintiff's Exhibit 7.)

These samples were taken out of the well pit and the total thickness of the hard-pan there is about twelve and a half to thirteen feet, exposed. I was not able to get below that. There are no signs of gravel in there.

I have made examination of the soil, and from all of my examinations of the land I don't think the land is at all adapted to the growing of fruit. The first requirement for successful production of fruit is depth of soil. It is considered that a depth of five feet is necessary. If you had a depth of only four feet the trees would grow, but production would be limited. You would not have tonnage and quality sufficient to overcome expenses of operation and make it a commercial proposition.

In soil as shallow as it is on this place the conditions would be about the same but even worse, because we have only about twenty-four inches of soil there. The trees would be of extremely short life.

It isn't possible to increase the depth of soil, as there is nothing within reasonable distance of the surface underlying the hard-pan in the form of soil or sand that would permit the penetration of roots or give them anything to grow in.

As to the effect of blasting on drainage, unless blasting were clear through the hard-pan in the sand, it would simply blow out a pocket and the trees would die out from drowning. [45]

Subsoiling is a technical operation that I think would have very little effect there. You merely

(Testimony of Herbert C. Davis.)

scratch the surface of the hard-pan and chip off some of it.

Q. What can you say about the surface soil? Is it ordinarily good land or rich land, or what is it?

A. No, sir. I wouldn't say so. There is no rank vegetation or indications on the plains where it is uncultivated that it is especially fertile. The grass is sparse. I wouldn't say it was rich land. I would say it is poor land.

Cross-examination.

I left school in 1918. I went into the army and when I returned from the army my occupation was farming. I returned in 1919. I engaged in grain and fruit-raising. When I engaged in my first fruit-raising I did not select land that was five feet in depth. I selected shallower soil. I have been on this tract of land during my examination once, about the 23rd of August, and outside of the borings delineated on this map and the examination of the well pit I simply took note of the condition of the trees and vines and the approximate amount of ground occupied by them, the drainage, and so forth. The greatest depth at any time bored on this tract was thirty-eight inches.

The hard-pan underlying this particular tract is fairly uniform. I examined the hard-pan in the well pit and did not try to go down any further than the bottom of the pit by boring. All I know about the thickness of hard-pan on this tract is what I saw in the well. I saw about thirteen feet of hard-pan and that eliminated any possibilities. It is of the

(Testimony of Herbert C. Davis.)

same general formation. As you approach the bottom of the pit it has a tendency to soften, due to moisture. Nearer the surface the hard-pan is dried out and [46] appears to be somewhat hard, but even the moist hard-pan is not soft enough for the penetration of roots.

Q. Then the hard-pan you are discussing in the pit is the soil that has been exposed to the air for how many years?

A. I don't know when the pit was dug.

I testified that it would take soil of the depth of five feet to grow fruit, and that in my opinion soil to the depth of four feet would not grow fruit-trees. The deeper the soil, the longer the life and more productive the tree. Trees would be less profitable as the depth decreases. I don't think they would grow profitably on any depth below five feet.

By short life I mean it is assumed in most of the deciduous fruits that the time at which they come into bearing is from four to ten years after planting, depending on the variety. Up to that point maintenance is expensive, which has to be distributed over production in later years. If your trees only live to be twelve or thirteen years, it cannot be done profitably. On shallow soil, hard-pan land, the life of trees is short. In some instances they don't live one year because of the depth of soil. They would begin to die in the first year in the shallowest depth, less than a foot, and if I saw an orchard planted on soil less than a foot deep I would expect the trees to die the first year. The

(Testimony of Herbert C. Davis.)

second year they would begin to die on soil about two feet deep, and the third year on soil three feet deep, approximately a foot to a year.

Grapes do very well on about four feet of soil. They are not profitable on less than that. In the Sacramento County and elsewhere in the Sacramento valley grapes are not being produced commercially and profitably on lands less than four feet [47] in depth. All the vineyards on that type of soil that I know of are not profitable.

I don't know anything about oranges or upon what depth of soil they can be successfully grown.

I have had experience in blasting land for the purpose of planting fruit-trees. I never recommend it and don't believe in it for that type of land. It is used on a type of land where there is a thin layer of hard-pan, not exceeding a foot and a half or two feet, underlaid with any soil or sand, so that by blasting and breaking up the hard-pan you strike a continuous strata of soil.

Q. What investigation have you made in this county where blasting has been resorted to, where hard-pan is of the same general thickness and condition as that on the property which you have specified here?

A. I have experience on my own land.

Q. But outside of that you had none? A. No.

Q. And no investigations? A. No.

Q. And no investigation whether fruit-trees will penetrate hard-pan or not?

(Testimony of Herbert C. Davis.)

A. No, except my own observations on our own land.

Q. And you have made no field observations out here in the colony? A. No, sir.

TESTIMONY OF CHARLES UNSWORTH, FOR DEFENDANT.

CHARLES UNSWORTH, a witness for defendant, testified:

I live on the Rio Linda district, and bought my place out there last October. It is located on this side of Rio Linda town site, on the main highway.

I am engaged in the fruit business out there. I have had [48] about three hundred trees covering three acres and a half. I raise poultry. The trees are mostly Tuscan peaches, but I have a few Freestone and a couple of apricot trees and five or six fig trees; a few pear trees; just enough for a family orchard. This season is the first time I have had a crop off the place.

I found the shallowest depth of soil about thirty inches. I could not say it is all less than five feet. Where we did test it it went to the end of the drill. I don't know how long the drill is—four or four and a half feet, probably.

I have trees planted on ground thirty inches in depth. I don't know whether or not the hard-pan at a depth of thirty inches is blasted where the trees are growing. The trees on the shallower soil look good. I can't see any difference between them and the trees where the soil is deeper, only there

(Testimony of Charles Unsworth.)

are a couple of trees where the fruit wasn't so large. It was good fruit, but not so large as on the deeper soil. The trees outside of this couple are of good size and good spread. There are few dead trees. The trees are all of uniform size.

I had a good crop this year. On one peach tree in particular I got five lugs. By lug I mean lug box, from forty to forty-five pounds. That is the box used for gathering fruit in the orchard. From other trees I got sometimes two, sometimes three, some more or less, I would judge about three lugs to a tree on an average. The fruit was large.

I did not sell them to the packing-house. They would not even look at the samples and said they were overstocked. As to quality and flavor, they were very good, juicy peaches.

This is a picture showing a house and some peach trees and flowers. That is a picture of my house and represents the present growth of peach trees. [49]

(The picture was received in evidence and marked Defendant's Exhibit 8.)

I would say the soil where I am located is adapted to commercial raising of fruit.

Cross-examination.

Mr. McCUTCHEN.—Q. You base this opinion on living out there less than a year?

A. Yes, sir.

Q. How many peaches did you sell in that year? How many tons, if you know?

(Testimony of Charles Unsworth.)

A. I should judge I sold about four and a half tons.

Q. Four tons and a half off how many trees?

A. Three acres and a half.

Redirect Examination.

Mr. BUTLER.—Q. You have observed other orchards around through the districts and you know something about orchards in general.

A. Well, yes, I have seen some orchards.

Q. And you have lived in California all your life?

A. Yes, sir. I have lived in California since '85.

Q. Farmed in Sacramento county before?

A. Yes, sir.

Mr. HUSTON.—That is all.

TESTIMONY OF JOHN POSEHN, FOR DEFENDANT.

JOHN POSEHN, a witness for defendant, testified:

I live in the Rio Linda district on Subdivision Six. My son, Robert, lives on the places adjoining. I have ten acres. Robert has five. I have been living there for five years next fall. [50]

I am engaged in the poultry business and have fifteen hundred chickens. That has been my principal business since living there.

The depth of soil on my property is from half a foot to two feet.

I have forty trees of different varieties in a family orchard. The orchard is planted on soil

(Testimony of John Posehn.)

from about a half a foot, a foot and two feet in depth. I blasted for the orchard, and they have grown well. I get a good crop on them. Every year it gets better and better. I have fruit off of those fruit-trees. I get all I want. I got a good crop this year.

I have some grape-vines. I brought some grapes I picked this morning. The variety there is Tokay. It came out of my vineyard. I planted the vines in 1925. I took off a bunch of Seedless on Monday, sixty pounds, and the other day I took a bunch of forty-five pounds from another Thompson Seedless. I think that's a good crop for one vine. I did not blast when I planted the grape vines. The soil is about a half a foot to two feet in depth.

I have grown grapes and fruit there. I think the soil is good soil for grapes. It seems to be well adapted for grapes. It needs working. Every soil needs some work. That soil is good soil for fruit if the ground is blasted.

Q. Where you blasted your trees do you get plenty of drainage in the hole or does the water stay there and spoil the tree?

A. It spoiled one year an apricot trees, and Mr. Leonard told me there was standing water on top from rain, and he told me I should drain that off; that we had sour sap.

We lost a peach tree the same way, but the others are all good. [51]

Where the holes were all blasted we got plenty of drainage. We didn't have sour sap, and the

(Testimony of John Posehn.)

rest of the trees were all right. We don't have water standing in the holes.

I have all the greens I want and raise vegetables and flowers. There are roses we have around the house. I got them from the Sacramento nursery, and I have roses now all summer. Roses grow well out there. The bushes are good and tall. I think that ground is rich and fertile.

These are Castor beans. They are seven feet high. We have them on the south side of the house. One I got from Nelson in Rio Linda, just a cutting. It is seven feet high.

I have ferns on the north side of my house, and if anybody buys them in the nursery in Sacramento they have to pay twenty-five cents apiece. On the north side of my house there is a pit five inches wide and thirty-five feet deep, and all them ferns grows in there.

From all the things that grow there I think the ground is good fertile soil.

I raise alfalfa and Sudan grass about five feet high, and I cut it five times. I need it for my chickens and my cow. Where the Sudan grass grows the soil is about six inches to a foot and two feet in depth. Alfalfa, the same. The soil on that depth takes up enough water to cultivate alfalfa and Sudan grass.

Q. Do you irrigate it?

A. Yes, sir. You have to keep lots of chickens, lots of minerals, lots of greens, lots of eggs, lots of money and I make lots of money.

(Testimony of John Posehn.)

Q. How many cuttings of alfalfa did you make this year? [52]

A. Six or seven.

Q. All good stands? A. Yes, sir.

Cross-examination.

I have been out there five years. I did not buy the land from this defendant company. I blasted for the trees. There is just a shallow layer of hard-pan out there.

Redirect Examination.

I do not know what is underneath, but it is good stuff.

Q. Before it is broken up, and before water is put on, isn't that hard too?

A. My son got some out and he raised his vegetables and then that he took out of the pit, he got good vegetables, everything done fine.

Q. I forgot to show you these pictures. Is this a picture of your place?

A. Yes, sir, that's a picture of my place.

Q. Is this a picture of your son's place?

A. Yes, and here is the Oriental Palm trees just the same as around this building. I planted them in 1924 and they are twenty-three feet long and about twenty-three inches around above the ground.

Q. Is this Robert's place?

A. That is Robert's place and I planted them, this section on Roberts place, and they are better than mine.

Q. The soil on Robert's place is about the same depth as your soil? A. Yes, sir. [53]

(Testimony of H. F. Bremer.)

Q. And do trees and vines do as well over there as on your place? A. Yes, sir.

TESTIMONY OF H. F. BREMER, FOR DEFENDANT.

H. F. BREMER, a witness for defendant, testified:

I live in the east end of the Rio Linda District in the subdivision known as Haggin's Park. I formerly owned another place there. We moved into the district in 1922 and at that time bought a piece of property in Haggin's Park. In that tract there are eleven and a fraction acres, almost twelve acres. When I first moved there I engaged in the poultry business and remained in that place approximately two years, and then sold out. When in possession of that property I planted fruit-trees—about fifty, would say,—a family orchard of various varieties. I blasted for them and they grew very well. They were planted in the spring of 1923.

I have seen those trees since I returned to the colony. They are doing very well. They have a crop of fruit this year. It is a pretty good crop. The size and quality of the fruit is good.

Within the last couple of years I purchased a piece of property in the same district, and again engaged in the poultry business. I have planted a few trees on this property since I returned. These were planted on blasted ground, where the depth of soil is approximately two and a half feet.

(Testimony of H. F. Bremer.)

I have some cherry trees going on the second year, and some peach and plum trees I planted last spring. The condition of the trees is very good, considering the age.

I haven't noticed any particular difference between the growth of those trees and others planted on blasted ground. [54]

Q. Do you consider that land out there in Haggin Park in Rio Linda territory adapted to the raising of fruit from what you have observed from your experience there?

A. I have observed that the neighboring colonies do not have the same kind of soil that we have, and I do not believe we could grow a commercial orchard for the reason—you wish to know that?

Q. Go ahead.

A. The reason I don't put it in I don't see where a commercial orchard is a bit better proposition than poultry.

Q. And what is that due to, the growth of fruit or the market? A. The price, the market.

WITNESS.—I have approximately twenty-five hundred birds and some baby chicks.

There are a number of orchards out there in the Haggin Park district. I don't pay much attention to it as I am entirely too busy. The orchards I have observed outside of my own place are apparently doing well where they are cared for.

Leaving the market to one side, in my opinion, that district is adapted to the commercial raising of fruit.

(Testimony of H. F. Bremer.)

Cross-examination.

Mr. McCUTCHEN.—Q. You have lived there about two years and then went away, and then you have lived there two years more?

A. Going on three.

Q. You have testified in a number of these cases, haven't you?

A. I was called by the company to come in and I had to come.

Q. How many? A. I can't tell.

Q. Have you ever had a subpoena served?

A. Not yet.

Q. You came in voluntarily? A. I did.

Q. You said you are principally in the poultry business? [55]

A. Yes, sir, I am in the poultry business.

Q. Your fruit ventures have been very much of a side line? A. The fruit I have raised?

Q. Yes. A. Merely for my own use.

Q. You have never produced any for yourself on a piece of land at the time you owned it?

A. No.

Mr. McCUTCHEN.—That is all.

TESTIMONY OF H. M. EDMUNDS, FOR DEFENDANT.

H. M. EDMUNDS, a witness for defendant, testified:

I live out in Rio Linda on the South Half of Fifty-five, Subdivision Five, west of the town site.

(Testimony of H. M. Edmunds.)

I have been living there for six years. My business is principally poultry. At the present time we have about twenty-three hundred birds. That has been my line of business ever since I have been in the district.

I hold an office in the Rio Linda Poultry Producers Association. That association is an incorporated co-operative association. Membership is confined within the limits of the Rio Linda district. Persons living outside of the district are not entitled to become members of the association.

The purpose of the association is to supply ourselves with the best possible feed at the lowest possible price. Dividends are returned to members over and above the actual cost of doing business. As to the quality of feed, nothing better can be bought. It is the practice of the association to buy the whole grain and grind and mix it. We have our own grinding and mixing machinery. The price, comparing quality, is as low as any retail price in Sacramento. Cheaper foods can be bought. We don't put [56] them out. We sell food to others beside the association members, but people outside the district cannot participate in the profits of dividends. One hundred thirty to one hundred forty thousand dollars has been returned to members during the time the association has been organized, in about eight years. I have received myself in dividends, during six years I have been a member, $1,443.50. My property cost me two thousand dollars. The fourteen hundred and some

(Testimony of H. M. Edmunds.)

odd dollars represents the dividend on purchases amounting to $15,248.00. The annual dividend is somewhere in the neighborhood of nine per cent. Every member of the association participates at the same rate.

I have planted a family orchard on my property—thirty-five to forty trees. Some of them are six years old, and some are more. Where the trees are blasted the soil is from six inches to two and a half feet in depth. I blasted for some of them, the first I put in. Where planted on that blasted ground the trees did fine until the spring of '27. They froze. That was a general condition all over the state. I lost six or eight trees at that time. Their condition when I lost those trees by frost was fine. They were in a perfect mass of bloom and in forty-eight hours they were black as the dirt from which they sprung. The balance lived and have done well.

The crops have been fine this year, plenty for our own use, plenty over to mail. We have never attempted to sell back east, because it is a losing proposition. There is no market in California. Everything is overdone in the fruit line. There is no question of quality when I say "losing proposition." It is just the market. Aside from the market, that land is adapted to commercial raising of fruit. It can't help but grow. [57]

I have an acre of grapes that are doing well. I put them in in the spring of '22. I have a crop of grapes off them. They bear fine.

Where trees were planted on unblasted ground

(Testimony of H. M. Edmunds.)

the depth of soil is, I would say, from one to two feet. They are four years old. Where the trees were planted on ground less than a foot in depth, unblasted, they did not die out at the end of one year, and where they were planted on two feet of soil they did not die out at the end of the second year. I haven't lost any of them. They are still growing there at four years.

I am acquainted with the location where the property of Emil Johnson is situated. I know the general district and the Johnson district in particular. I know the values of land there for the purposes for which they are adapted.

Q. What in your opinion would be the value of land in the district in which the Emil Johnson property is located in the month of February, 1923?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid.

The COURT.—I hardly think the competency of the witness has been shown. Objection sustained.

Mr. BUTLER.—Exception. That is all.

Cross-examination.

I am friendly with the Sacramento Suburban Fruit Lands Company. I bought my land from them. I am the head of this Rio Linda Poultry Producers Association. Our prices are as low as any, comparing quality. The price of Egg Mash No. 1 this morning is, I [58] think, $2.75. I don't know whether the price of Egg Mash No. 1 of the

(Testimony of J. S. McNaughton.)

Producers of Central California is $2.65 this morning. At times there is a difference of ten or fifteen cents in their favor. At other times it is reversed.

TESTIMONY OF J. S. McNAUGHTON, FOR DEFENDANT.

J. S. McNAUGHTON, a witness for defendant, testified:

I am the horticultural adviser of the Sacramento Suburban Fruit Lands Company and have been acting in that capacity for a little over eight years. I know Mr. Emil Johnson. I met him when he first came here to look over the territory. I haven't any recollection now where I took him, except one lot, Lot Seventy-seven Rio Linda Subdivision Five, and the lot that he took afterwards. I don't remember how much time we put in on that trip of inspection. I know the lot that he owns, Lot Thirty-four. I have observed it from time to time as to the care and attention bestowed on it, particularly this year. I noticed there wasn't any cultivation in the vineyard until after the 15th of April, which was too late to conserve any moisture. The vines had not been worked around by hand as they should have been. They were simply disced up. All that has been done this year is dry discing.

In a locality such as the Johnson property, in the way of proper care and attention to vines, they should be plowed and harrowed, and the vines worked around individually to get the weeds away

(Testimony of J. S. McNaughton.)

and get the dirt loose around the vine as soon as you can get on the ground in the spring after the rains are over, usually in March. If you do not do it at that time it gets too dry. That is what happened this year with the Johnson vineyard. There had been no cultivating done around the vines in removing the weeds or digging around the vines at all until after the 15th of April. [59] I don't know what care and attention he has given it in years past.

TESTIMONY OF LAMBERT HAGEL, FOR DEFENDANT.

LAMBERT HAGEL, a witness for defendant, testified:

I have lived in the Rio Linda district in Subdivision Six a little over five years. I have forty acres in my place. I have fifty-eight fruit-trees, thirty-six different varieties, constituting a family orchard. I have no commercial orchard.

The depth of soil where the fruit-trees are planted is from seven up to twenty-four inches. I blasted where I planted my fruit-trees, in the holes where the trees would sit. The trees have had a wonderful growth. I have sixteen cherry trees, the diameter of the trunk from two and a half to three and a half inches. I have one nectarine tree on the ground. The trunk is six inches, the height I don't know. The trees have wonderful leafage. They are pretty high for the age. They have made a

(Testimony of Lambert Hagel.)

good growth and bear good fruit. The nectarines I have about three lug boxes apiece—nectarines of wonderful size, as big as I have seen, and so are the apples and cherries. The rest of the fruit was not so good. It was a fair crop for the age of the trees. I got sufficient for the use of my family and more over.

I have twenty-eight acres planted in grapes in what I call my commercial orchard, or commercial vineyard. The vines are from one year old to three and a half years. I have never put a drop of water on since I planted, and there is the result. That is a Carignane. The Carignane in general are fairly good. Some of the vines haven't as much on as this, of which I took a fair sample. Some have more. [60]

The depth of soil runs from six inches to thirty-two. I did not blast for the vines.

This picture was taken on my place.

(The picture was received in evidence and marked Defendant's Exhibit 10.)

This is what is called Thompson Seedless. This cutting is from this year's growth. Thompson Seedless grows in long runners, a little longer than any others, especially if you give them good care. This is twenty-four and a half feet long. It is one year's growth.

I have samples of vegetables grown on my place. Here is a pepper I pulled out this morning from my vegetable garden. Here is an eggplant. Here is a melon I picked last night off my field a quar-

(Testimony of Lambert Hagel.)

ter of a mile away from the house. I have many melons out there and they never had a drop of water because now water goes into my vineyard. Here are some pomegranates and here are a couple of walnuts. Here is a cluster of Tokays. This is irrigated. I keep it close to my trees and I can't keep the water off. Here is a cluster of Thompson Seedless off the vine.

From my experience out there I am satisfied I can grow anything I want to. My vegetable garden is in good shape.

I am engaged in the poultry business. I have fourteen hundred hens. I raise all the greens I want for my chickens. I raise alfalfa. Where it is planted the soil is from one to two feet deep. I cut it eight times this year. As a rule I let it grow about eighteen inches high and cut it while it is still tender. I raise alfalfa satisfactorily on that land.

I know the location of the Emil Johnson place. It is about a mile and a half from my place. [61]

Q. Do you know any reason why you cannot raise fruit and vegetables and grape-vines on that soil the same as you have on yours with proper attention?

Mr. McCUTCHEN.—Objected to. I don't think the question—he says, "Do you know any reason," why he couldn't.

The COURT.—Sustained. He says he doesn't know anything about it.

Mr. BUTLER.—Exception. That is all.

(Testimony of Lambert Hagel.)

Cross-examination.

I have been here and testified for this company in several actions. I was not subpoenaed to come here to-day. I wanted to come in order to defend my own property.

Those blue grapes on the first bunch are the Carignane. That is the normal size. That grape is not generally as big as a Tokay.

I have fruit-trees for family use. I never sold any fruit off of those trees. The land is principally planted to grapes. I believe in grapes more than anything else because there is no place for other tree fruits. I had twenty-eight acres planted to grapes last year, nine in berry. Off of nine acres last year I got between four and six tons. They were two and a half years old. I have bought other grapes and sold them again.

Redirect Examination.

Those grapes that I bought were for resale. I bought them on the field and sold them on the field.

TESTIMONY OF E. P. VERNER, FOR DEFENDANT.

E. P. VERNER, a witness for defendant, testified: [62]

I am engaged in the real estate business in Sacramento, associated with the firm of Wright & Kimbrough, in charge of the country land department. My particular business is the buying and selling of

(Testimony of E. P. Verner.)

fruit lands. I have been in that business seventeen years.

I am familiar with the Rio Linda district and know the values of properties in that district.

I am acquainted with the Emil Johnson property, and the reasonable value of that property on an acreage basis. It is three hundred seventy-five dollars an acre, without the improvements. I would say it was of the same value in the month of February, 1923. I have taken into consideration the valuation of real property out there, have seen the fruit and vines growing through the district. One very important consideration is location. Its location is within eight and a half or nine miles of Sacramento, between two transcontinental railroads, and the local electric road running halfway between the two, which makes it easy for settlers to come back and forth to town, if they wish to commute, and another very important thing is that it is on high land, above any flood district. Last winter between here and North Sacramento, and as far as five miles above, it was necessary for a great many people removed from the electric transportation to travel twenty-five miles to arrive in Sacramento, whereas in the Rio Linda section they could get on the electric car and come to work. I considered the question of roads, highways, power lines, churches and schools, and that it is a settled community with a uniform line of industry and the availability of power and water.

I am familiar with the Carmichael district and

(Testimony of E. P. Verner.)

have made [63] sales of property in that district. I sold a parcel of thirty acres in the Carmichael district to Mrs. Lily I. Babcock, and know the fruit production on that property. Approximately twelve acres of that are planted to Washington Navel oranges; about an acre and a half of grapefruit, and probably an acre of Imperial prunes. The depth of soil on that property is from eighteen inches to about thirty-six inches. Where the trees were planted the ground was blasted and puddled. That is hard-pan land. The last three years the orange crop alone has been producing around thirty to thirty-five tons, the crop, the twelve acres. The lowest estimate for the '28 crop is fifty tons, and the highest estimate seventy-five, of shipping oranges.

Cross-examination.

I have an opinion as to the relative valuation of land in Fair Oaks District to the land in Rio Linda. Fair Oaks is eighteen miles from Sacramento. You must consider location. The Rio Linda lands have a greater value, because they are close in.

The average price of all California lands has increased approximately twenty-five dollars an acre from 1920. I could not say how much they increased from September, 1921, to February, 1923, in that district.

I have no recollection of any discussion with Mr. Johnson. I have had him pointed out several times, but I have no recollection of any conversation with him. I did not tell him that if he paid two

(Testimony of E. P. Verner.)

hundred fifty dollars an acre for that land in Rio Linda, he paid too much. We have lands in Fair Oaks—twenty acre tract, listed at twenty-eight hundred dollars.

TESTIMONY OF R. O. BOLDEN, FOR DEFENDANT.

R. O. BOLDEN, a witness for defendant, testified: [64]

I live in the Rio Linda district and have been there for seven years. I moved in there in the fall of 1921.

I am acquainted with Mr. Emil Johnson, and I remember the time that Mr. Emil Johnson arrived in Rio Linda. Before his arrival there I received a letter from Mr. Emil Johnson, asking for information about Rio Linda. I looked for the letter last night but couldn't find it. I remember he wrote to me regarding the Rio Linda district and I answered him as far as I was concerned I liked it all right out here, but I don't say it would suit everybody, and he would better come out here and look over the land himself before he bought. After he arrived he stated to me that he had received the letter.

Cross-examination.

It is not a fact that the letter came from Mrs. Johnson.

I have never made any sales for the Sacramento Suburban Fruit Lands Company, and never received any commissions from them.

(Testimony of R. O. Bolden.)

I live on the west side of the town site and am staying on the place, as I have done ever since I came out. I did not have any other conversation with Mr. Johnson about this land.

TESTIMONY OF LOUIS TERKELSON, FOR DEFENDANT.

LOUIS TERKELSON, a witness for defendant, testified:

I live on the boulevard in Rio Linda, this side of the town site. I have been there for fifteen years. Before moving to Rio Linda I lived in Southern California, where I was engaged in fruit raising. I have been engaged in fruit raising ever since I have been in Rio Linda. I have forty acres of upland. The depth of soil is from three to eight feet. I have a good many varieties of fruit, but my principal crop is almonds and pears. [65] I have about three acres in pears, and have just a medium crop this year—I should think, about seven and a half tons. The reason for its being a medium crop this year, as compared to a better crop in some other years, was the weather conditions in the spring. Last year we did not have a good crop. They were pretty near a failure over the State. The year before that we had a very heavy crop. I shipped about seven hundred boxes at the rate of fifty pounds a box, and three hundred boxes I did not get shipped, because they closed down the packing-houses. I think there were around fifteen or twenty tons on the trees that year.

(Testimony of Louis Terkelson.)

I have about twenty-three or twenty-four acres in almonds. My pear trees are about thirteen years old. The almond trees are from thirteen to fourteen years old. About eleven acres of almonds are in bearing. I generally have a good crop. This year the crop is just medium on account of the heavy rains in the blooming season.

I consider that land good fruit land and adaptable to the raising of fruits.

I know the orchard of Mr. Unsworth. It is right across the road from me. I think his orchard is fine for fruit.

TESTIMONY OF F. E. TWINING, FOR DEFENDANT.

F. E. TWINING, a witness for defendant, testified:

I live in Fresno. I am an agricultural chemist and maintain there a laboratory for the examination of soils. That laboratory is the most completely equipped commercial laboratory on the Pacific Coast. [66]

In my practice I am called upon to make examinations of soils to determine their adaptability to certain purposes, particularly in the growing of fruits.

I have made investigations and tests throughout the Rio Linda district. I have made over three hundred borings and tests and subjected the borings to chemical analysis to determine the content of the soil.

(Testimony of F. E. Twining.)

I have been on the particular tract known as the Emil Johnson tract, and have made borings there to determine the depth of soil. It runs from eight inches to three and a half feet. I found two spots of a depth of eight inches. The place will average in depth from two to two and a half feet.

I examined the character of the top soil and found hard-pan underlying. I have taken samples of the hard-pan. This is the top layer of hard-pan, the indurated portion impervious to moisture, under which the portion absorbs water readily. The impervious layer on top is a thin shell. It is cemented with a hydro-oxide of iron, carried down by moisture from above. That thin top layer prevents the water from penetrating. It varies from a sixteenth to a quarter of an inch, and if the top layer is removed water will penetrate the hard-pan. If it is broken up and thrown out on the ground and exposed to the air and elements it will disintegrate and will not re-cement and will become practically the same as the surface soil. If the top impervious layer is broken up by blasting, the underlying hard-pan will permit the absorption of water for maintenance of plant life, and also permit drainage of the surplus water.

I have made an analysis of the hard-pan, as well as the soil, and it is very little different in the actual constituents [67] except organic matters. The deeper layers of soil don't contain organic matter, by which I mean decomposing vegetation. That is necessary for the maintenance of plant life.

(Testimony of F. E. Twining.)

The plants feed in the upper layer of soil. Most of the plants get their food, constituting lime, potash, iron, magnesia, and so forth, from that area. The idea is to have a sufficient amount of soil to hold a sufficient amount of moisture for the growth of the plant. That is the necessity of depth, so the roots can go down.

I have been in this business a good many years and have given advice in the planting of orchards through the state in a great many instances. I have examined thousands. I am familiar with all the standard and recent works on the subject of plant growth and horticulture. I know of no arbitrary standard set by horticulturists setting five feet of top soil as an essential for the growth of trees. There is no arbitrary standard of any kind.

I do not know it to be an accepted fact that trees planted in one foot of soil on top of hard-pan will die at the end of one year, and in two feet at the end of two years, and in three feet at the end of three years.

I have known plants to live for several years on one foot of soil, and to die the first year on fifty feet of soil. I have made a chemical analysis of soil of varying depths on this tract of land. I have found the phosphoric acid constituent to be .21 of one per cent, 8,400 pounds to an acre-foot, and .57 of one per cent of potash, which is 22,800. That is ample to sustain plant life over a period of years. Plants will use fifty to one hundred pounds of potash per acre, and twenty-five to fifty pounds of

(Testimony of F. E. Twining.)

phosphoric acid per acre a year. I have made a general examination over the Rio Linda project and from my examination of the [68] Emil Johnson tract, my chemical analysis and my investigation of the soil, my knowledge and experience, I would say that soil, properly prepared, is adapted to the raising of fruit. By "properly prepared" I mean that in places that are shallow it will be necessary to blast and loosen up the subsoil, and where the soil was blasted where necessary, the Emil Johnson ground will grow fruit in commercial quantities. I know of nothing outside of the physical condition, the necessity for blasting, that would prevent the growth of fruit on that tract. I know of nothing detrimental in the soil to the growing of fruit.

(An exhibit of hard-pan was received in evidence and marked Defendant's Exhibit 11.)

Cross-examination.

I have made quite a number of similar examinations of soil for the defendant on the Rio Linda district, and also on some of the adjoining districts. I came from Fresno to make them. I have not had a lot of experience making soil analyses for colonization projects down that way. We made an alkali survey of over fifty thousand acres of Chowchilla land.

As to how this Johnson property compares with the Wellnitz property I would have to look that up. There is not very much difference in the soil.

(Testimony of F. E. Twining.)

I do not concede that the Wellnitz place was a very poor piece of land. As I remember, there was some shallow soil that would necessarily require certain treatment.

I have made a lot of chemical analyses out there and always come in and say the soil has all the chemicals necessary to produce proper tree life. I observed the general character of the uncultivated land in the Rio Linda district. In some places the vegetation is very sparse. In some places it is good. They [69] can't grow vegetation where there is no water. In the uplands the blades of grass are not six inches apart; they are very dense in lots of places. I would say this Johnson land was well adapted to the growing of peaches, not without preparation. The preparation necessary in shallow soil to loosen it up.

I would say it is well adapted to the raising of pears and apricots, but not so well to cherries. I wouldn't advise raising of cherries. They will grow there.

Q. Considering the depth of soil, two and a half feet on the average, would you say that is good, real good commercial orchard land?

A. It requires loosening up, of course. It won't hold enough water in that condition to run through it. Of course, trees will grow on two to two and a half feet of soil; that is, if properly watered. It is not necessary to blast. You can grow big trees on one foot of soil.

(Testimony of F. E. Twining.)

Q. Don't you think they would blow over in the wind?

A. If it was loose soil and the roots were all within one foot, they would blow over. I have seen in sandy soil where it was fifty feet deep, trees fifteen to twenty years old. The trees would blow over when they only have a few feet of root surface.

Q. Taking the general commercial orchard in California, that doesn't compare favorably, does it?

A. Well, I might state that the best orchards in California are on soil deeper than a foot and a half to two feet.

Redirect Examination.

Q. Take that Emil Johnson lot out there, you know the hard-pan, the thickness and condition. What would it cost per vine or per tree to blast that? [70]

A. In order to crack that up in good shape I would say twenty-five to thirty dollars an acre; maybe a little more. There are some places it is pretty close.

Q. Do you know anything about the underground water supply in that locality?

A. I don't know exactly what it is, but I know it is over fifteen or sixteen feet at that point.

Q. And is there, from your knowledge of conditions there, an ample underground water supply at that depth?

A. It must be pumped out. There is no connection with the underground water. The water must be put on the surface for plant growth.

(Testimony of E. H. Traxler.)

Q. If that water is put on the surface and plant growth is irrigated, it will grow? A. Yes, sir.

TESTIMONY OF E. H. TRAXLER, FOR DEFENDANT.

E. H. TRAXLER, a witness for defendant, testified:

I am engaged in the real estate business here, and have for a long time specialized in farm lands and country property. I was associated with the Ben Leonard Company from the time it was organized. At the present time, however, I am operating independently. I am familiar with the district known as Rio Linda. During the time that I was with the Ben Leonard Company they were owners of a tract of land in the immediate vicinity of Rio Linda, adjoining the colony to the south, and I was familiar with the land known as the Arcade Park district, and was familiar with sales of lots in the Arcade Park district, and sold a good many. The conditions there as to depth and quality of soil are about the same as throughout the Rio Linda district. Both were parts of the old Haggin Grant. [71]

I know of orchards planted on the Arcade Park district. Mr. Stout has eleven acres planted right close to the highway on hard-pan land, where he placed peaches, prunes and apricots and his family orchard. There isn't any finer orchard anywhere in the country than he has, and he never put a drop of water on it until about the fourth year. Raised

(Testimony of E. H. Traxler.)

it by good cultivation, and well taken care of, and pruned, graded, sprayed, plowed, harrowed, pruned it all season. I have gone there in the middle of July and kicked the dry dirt off the top with my toe and there is the moisture. That was good farming. That is six or seven years old, and I believe he has picked six tons to the acre and received eighty dollars a ton from Libby, McNeil & Libby. The grade was number one.

Frank Orr has a wonderful orchard of peaches, plums, apricots and cherries. The depth of the soil was from two and a half to three feet, all blasted. The growth of trees was very fine. He gave them wonderful care, pruning, spraying, cultivating, irrigating. The class of fruit was number one, thinned down.

I don't think the land was a bit better than the Rio Linda district.

I am familiar with this Emil Johnson property. I have seen the property, Lot Thirty-five of Rio Linda Subdivision Five. I have known the Rio Linda district for a great many years. My opinion of the reasonable value of that lot in the month of February, 1923, I would say, would not be out of the way at four hundred dollars an acre. I would consider in fixing that valuation that it is close to a growing place like Sacramento, the transportation and the help that the people are given there in their different lines, whether raising fruits or raising chickens. By [72] help I mean the advisers paid by the Rio Linda company, and by transporta-

(Testimony of E. H. Traxler.)

tion, I meant the railroad transportation and the roads and highways throughout the district.

I know the water conditions. I have helped put down several wells. The water level is about the same. It depends on the land and the depth of soil. The deepest well for irrigation in that district is one hundred twenty-four feet. There is an ample underground supply of water there to be had by pumping. There is power for pumping. It was the finest water in the world.

Q. Comparing again the lands in the Arcade Park District, what were those lands sold for?

Mr. McCUTCHEN.—Objected to as incompetent, irrelevant and immaterial.

Mr. BUTLER.—Withdrawn. What was the reasonable value of that land on an acreage basis, in the Arcade Park section?

Mr. McCUTCHEN.—Same objection. He is cross-examining his own expert.

Mr. BUTLER.—I think I have the right—that is withdrawn.

Q. Do you have in the Arcade Park district any advantages which they have in Rio Linda?

Mr. McCUTCHEN.—The same objection.

The COURT.—Sustained.

Mr. HUSTON.—Exception.

Cross-examination.

I was *interest* in selling the Arcade Park Subdivision. I have no longer any interest in it. I sold out a year ago last March. I did have a lot

(Testimony of E. H. Traxler.)

of stock in the buying company, but I haven't it now. I have no interest in keeping up prices in that locality. [73]

I have advised loans on places out there. I have advised people to loan money on the land—a great deal of the Rio Linda land.

I am very friendly with Mr. Bush of the Ben Leonard Company.

Q. This production of the Stout place, did you stay there and see that fruit weighed and measured in some way, or are you going on what somebody told you? A. I know the man.

Q. You know Mr. Stout, and you are going on what he has told you? A. Absolutely.

Q. The same is true of the other places you mentioned? A. Yes, sir.

Q. Where you put the price of four hundred dollars an acre on the Emil Johnson place, you are considering what that place has been sold for to Mr. Johnson?

A. No. I don't know as I know what it was sold for.

Q. Do you know of any sales out in that district around 1923 except made by the Sacramento Suburban Fruit Lands Company?

A. Yes, sir. There are many sales made. I would have to go up and look up old records.

Q. You don't recall any individual one?

A. Yes, sir. They sold lots of land out there.

Q. You say you considered the help given the people? A. Yes, sir.

(Testimony of E. H. Traxler.)

Q. You mean this supposed horticultural adviser? Did you take into consideration the fact, if such it be, that these people have no absolute right to that, that that is a privilege that may be withdrawn at any time.

A. Well, they surely gave it to them.

Q. Do you take that into consideration?

A. I surely do. [74]

Q. You consider it might be withdrawn at any time?

A. I don't know as it would, but it never has been.

Q. You are assuming they would have it all the time? How much value do you put on that? How much does that add to the value of the land?

A. If you had to go and employ a man to come and teach you how to do it, it would cost several dollars a day.

Q. I want to know how much of this four hundred dollars an acre you set aside for this?

A. It has been running a good many years. You will have to pro rate it.

Q. You are the man that is giving the opinion. I wish you would answer that question.

A. I would consider it was almost worth as much as the land was worth to have a man come and tell you how, give you advice on running the place, if you come in here a stranger.

TESTIMONY OF ARTHUR MORLEY, FOR DEFENDANT.

ARTHUR MORLEY, a witness for defendant, testified:

I live in the Arcade Park district, just south of Rio Linda. I have sixteen or seventeen acres. My place is bordering the south or the east of the tract, about a mile from the Sacramento Suburban Fruit Lands. The character of the land where I am living is about the same as it is throughout the Rio Linda district. I have been all over that district rather extensively, and have made a careful investigation of it, and know what the soil is in Rio Linda.

On my place I am raising plums, pears, peaches, apricots and cherries. The depth of soil on my place averages from about a foot to three feet. The soil on my place is blasted for trees. [75] They have done very well. My trees are about ten years old. I have been engaged in the fruit business about fifteen years, and in different localities. I have also some other orchards out there in my charge—one of thirty acres, another of twenty acres. I have been caring for them for several years. I have occasion to plant young trees and care for them in a nursery on shallow ground. I know of no rule among horticultural writers setting a standard of five feet of depth necessary for the growth of fruit-trees, nor of any rule that requires a tree to die at one year when planted on one foot

(Testimony of Arthur Morley.)

of soil, or two years when planted on two feet. The trees on these places adjoining mine have all done well—planted on soil of similar depth and blasted, with hard-pan underneath, just about the same as in the Rio Linda district. There is nothing that I know of in soil of that character or that depth injurious to the growth of fruit-trees. The crops on my place, and these other places, are heavy. The trees are bearing well and the size and quality of the fruit is good.

I have recently gone through the Rio Linda district with Mr. Jarvis on an expedition extending over thirty days to observe the conditions there, and have seen fruit-trees growing around the Rio Linda district, and have noticed the fruit-trees and the conditions under which they are growing, the care and cultivation, the depth of soil, and where blasted or not. The growth of fruit-trees in the Rio Linda district is good if properly taken care of. Where I found an orchard properly planted and cared for, it has been doing well. Where I found a lack of care, I found a corresponding appearance in the orchard.

We made an investigation to determine whether or not fruit-trees would penetrate into hard-pan after it had been blasted. [76] We made an excavation alongside of three different trees where the ground had been blasted, to see whether the roots did go down and penetrate. These are pictures of the excavation where we made that experiment. The roots shown in these pictures are penetrating

(Testimony of Arthur Morley.)

into the hard-pan. The depth of soil where these trees were planted was about one foot over the hard-pan. There is a layer of hard-pan in each one of these pictures that is broken and shattered by blasting.

(The pictures were received in evidence and marked Defendant's Exhibit 12.)

Q. Now, in your opinion, do you consider the area known as Rio Linda, when properly prepared by blasting and the hard-pan broken up, adaptable to the raising of trees? A. Yes, sir, I do.

Q. Any reason why it won't grow fruit as well as the district in which you are located?

A. No, sir.

Cross-examination.

Q. You have stated you believe the Rio Linda district is adapted to the growing of trees?

A. Yes, sir.

Q. And upon what do you base your opinion?

A. Because you see it bearing trees there.

Q. Where? A. All over the district.

Q. Name one.

A. On one place, the Hansen orchard, it had fruit ready to pick.

Q. Name another place.

A. The Seidenstricker. [77]

Q. Another one. A. The Case place.

WITNESS.—On the Hansen place are planted prunes, grapes and peaches. I don't know how much they raised there last year, nor the year before.

(Testimony of Arthur Morley.)

I know what's on the Seidenstricker place, but I don't know anything about the history of the tract, nor how much was raised last year, nor the year before. I know there was fruit there this year ready to pick. It was a good crop, of good quality. I was shipping fruit of the same quality at that time.

Q. Now, on this place here, where you showed the olive trees growing, may I ask you, Mr. Morley, if there is any reason why you selected an olive tree?

A. We knew it had been blasted. We wanted to see how the roots travelled down through that blasted area.

WITNESS.—There is not much difference between the character of an olive tree root and an apricot. It is not particularly more fibrous. As to the depth of hard-pan in that tract, we went down four feet and it was still hard-pan. I don't know anything about the history of the Smith place. I don't know that Mr. Smith has practically abandoned that as a commercial orchard. I couldn't tell you. He is living there. There were crops this year, but not very much, because the weather condition spoiled all of the olive crop.

I have made about three hundred investigations for the defendant company in Rio Linda in about thirty days. We went out on a tract of land, bore down to see the depth of soil, and to see the condition of the trees, and note the care they had been

(Testimony of O. W. Jarvis.)

given, whether they had been sprayed, cultivated and irrigated properly. We did not examine the depth of the hard-pan. [78]

TESTIMONY OF O. W. JARVIS, FOR DEFENDANT.

O. W. JARVIS, a witness for defendant, testified:

I have been in the horticultural business for a a great many years, as an adviser and practical man. I am a graduate of the Utah College of Agriculture, and then was Farm Adviser for Sacramento County for a time. I have lived in Sacramento County for ten years, and during all that time I have been engaged in horticultural work. I know the territory known as Rio Linda.

I was specially employed by the Sacramento Suburban Fruit Lands Company to make a survey and report, and that is my only connection with them.

With Mr. Morley, I spent some time in going over the Rio Linda project for the purpose of examining the depth of soil where fruit was growing, and to determine the fruit conditions in the tract generally. I made an estimate of the number of fruit-trees growing in the colony. We had a map of the district, and, knowing the acreage of each tract, we had it on the map, and made an estimate as close as we could of the acreage of various fruits on that particular tract, and later we estimated, knowing whether the trees were eighteen, twenty, twenty-two

(Testimony of O. W. Jarvis.)

or twenty-five feet apart, the number per acre, and we made an approximation of the various kinds of fruit and a total for the district.

Our findings as to the number of trees growing in the district, outside of family orchards, are as follows: Almonds, 18,700; olives, 9,370; peaches, 7,060; plumbs, 2,950; pears, 8,875; prunes, 2,040; figs, 16,230; grapes, 97,650; apricots, 1,550; walnuts, 490; cherries, 9,465; apples, 600; persimmons, 100. Total number of fruit-trees outside of family orchards, 83,650, and about 8,100 in family orchards, making a total fruit-trees in the colony [79] 91,750, and the total number of vines, 100,900.

We found conditions flourishing from one end of the district to the other. We found good, bad and indifferent trees grown on similar and dissimilar soils. From the east and to the west and the north to the south, where they had been given the best care, invariably we found good trees. Where they had been given indifferent care, naturally you would expect to find poor trees, although we found good trees in spite of apparent neglect, and some trees that had died on account of climatic conditions or weather or poor drainage, where the owners said they had given them good care. Under general conditions, where the trees in the orchards had been cared for, we usually found good trees with good crops.

I am familiar with the depth of soils throughout the district generally. From my experience, in that depth of soil, with proper preparation, blasting, and

(Testimony of O. W. Jarvis.)

so forth, the soil in my opinion is adapted to the commercial growing of fruits. There is nothing that I know of, aside from the physical condition, necessitating blasting, that would interfere with the growth of fruit in that district.

I was with Mr. Morley at the time the excavations were made by the side of these three olive trees. I myself made excavations by the side of other trees to find whether the root growth did penetrate the hard-pan after blasting. These were plum trees. I found conditions very similar to these in connection with the olives.

I did not investigate as to other kinds of trees in this district. I have in other places. I have seen peaches, pears, apricots, with roots growing in hard-pan where properly blasted; not so thoroughly as I have here. It has been incidental [80] to other work, but I have seen the fact.

I am familiar with other districts in the Sacramento Valley. I am familiar with the fruit district of Oroville. There are orchards up there planted in hard-pan land of a depth of a foot and a half to two feet. They will run from one foot up to three or four feet on one tract. You don't often find a whole tract with soil as shallow as you speak of. I find orchards of trees planted on soil up to a depth of a foot and a half in the Oroville district. That is usually blasted. There is the same kind and character of hard-pan there as in Rio Linda. I find the same kind and quality of hard-pan in the valley as I do in the Rio Linda district. There

(Testimony of O. W. Jarvis.)

are a great many orchards planted there—citrus orchards, figs, apricots and olives. The figs do well, and olives. That is one of the leading olive districts of the state.

I found the trees planted on all kinds of soil, and found them in shallow soil. I found oranges growing there. The period of marketing these oranges around Oroville comes in way ahead of oranges from the south. They grow a very good quality in shallow soil. They get a good price. There are large areas in Sutter County which are well recognized peach growing districts. Near the Feather River you get good soil. There are thousands of acres of peach orchards producing heavy crops in soil running from two and a half to four feet, and some still shallower. I have found a number of borings shallower than two and a half. These are underlaid with hard-pan and usually blasted for planting, when they come anywhere near the surface. Peaches grow and deliver crops of number one quality on this shallow hard-pan land after they have been planted.

There is no reason that I know of, or any practice among [81] horticulturists, or any rule advanced by any writer, setting the arbitrary standard at five feet of soil as necessary for the growth of fruit trees. I have heard a few people give that theory, but there is no accepted standard of that kind. In practice, the contrary has been proven. I never heard of any rule that trees planted on the soil to the depth of one foot usually die at the end of

(Testimony of O. W. Jarvis.)

the first year, and I never heard that the life of trees planted in two feet is two years.

Cross-examination.

The depth of soil is important in determining whether it is adapted to growing fruit-trees. There are a good many important factors. If there was five feet of soil on the Johnson place, I think it would be better adapted to the growing of fruit. The shallower soil is more difficult to handle, requiring greater care in the application of water.

There are thousands of acres of peaches in Sutter County grown on soil only three or four feet deep, and even shallower, with blasting where hard-pan comes close to the surface. I have examined the hard-pan. I haven't been clear through. I have been down in a number of places where they were blasting. The prevailing practice was to blast and then turn water into the hole, and if water runs out through, then they have open drainage. If it doesn't, then they have to blast again.

I made an examination of these lands out there about June, 1927; spent two days out there, yes. We were on the Klaffenbach place. I don't remember if Mr. Klaffenbach asked me to go out and test the soil. I don't remember stating to Mrs. Klaffenbach and the others present that there wasn't any use getting out and testing that soil; that it was only a couple of feet [82] deep and was not adaptable to the commercial raising of fruit.

(Testimony of O. W. Jarvis.)

I know the plaintiff in this case, Emil Johnson, and I was on his place and tested the soil there. I don't remember making any statement that his land was not adapted to the commercial raising of fruit. I remember distinctly telling a number who asked that we were making an examination for the District Attorney, and we would make our report when the investigation was completed and not until then, and we could not make any communication until we had finished it, and would not make a report until the investigations were complete.

TESTIMONY OF L. B. SCHEI, FOR DEFENDANT.

L. B. SCHEI, a witness for defendant, testified:

I am the resident secretary of the Sacramento Suburban Fruit Lands Company, and have been acting in that capacity since 1916. I am acquainted with Mr. Emil Johnson, the plaintiff in this case. I was resident secretary when Mr. Johnson first came to Sacramento. I met Mr. Johnson at the time of his arrival and made a trip with him out over the territory.

Q. Will you describe that trip to us and tell us where you went with Mr. Johnson, what places you took him to and what happened?

A. Mr. Johnson told me that he had known of Mr. Bolden and the Olsen family, and I took him out into the country that day, going I believe directly to the Bolden place, and then to the Olsen place,

(Testimony of L. B. Schei.)

and following that we went over to Lot Thirty-two in New Prague, which is not a great distance from there, I presume a mile or a mile and a quarter, which is the lot that he first had under consideration. From that lot we went across the town site again to the eastern portion of our land, just made a general trip over there and returned to town. [83]

Q. Did you take him to the Bolden and Olsen places—did he converse with the folks there, Mr. Bolden and Mr. Olsen? A. Yes, sir.

Q. During the time that you were there and called upon these people, did you afford him any opportunity for free conversation with him, or did you stick around all the time?

A. I certainly did. And, moreover, the next morning, which was Sunday, as I recall, I took Mr. Johnson back to Mr. Bolden's as he had been invited out by Mr. Bolden to spend the day with him. I took him out Sunday morning and left him there.

Cross-examination.

Q. You have taken hundreds of people out and shown them around the place there?

A. Yes, sir, that is my business.

Q. Do you remember with distinctness all these things that are said and the places visited each time?

A. I can remember certain things about everybody, and particularly cases like this where he knew some particular individual.

TESTIMONY OF E. E. AMBLAD, FOR DEFENDANT.

E. E. AMBLAD, a witness for defendant, testified:

Until a few months ago I was the Sales Manager for Sacramento Suburban Fruit Lands Company, located at our office in Minneapolis, and I was such during the time the Emil Johnson transaction was handled. I recall having certain conversations with Mr. Johnson. The first conversation was held at my office. His brother first brought him in. Mrs. Johnson was not present. We had several conversations, I cannot distinguish one from the others. I told him about the district in general, about the [84] raising of poultry out there, and told him about the poultry association, which he could join if he came out. It would cost him fifty dollars as a membership, but through this association he was able to buy his feed cheap and deliver his eggs to the association and they would market them for him. I told him about the poultry adviser who would consult with him from the beginning to help him get his poultry buildings started, and told him in general about the community. I told him about what the various people were doing. I had a large map in my office of the order of this one here, and went through the district, giving the names of the people who had formerly lived in Minneapolis. He asked in particular about a friend of his who lived out here, two friends, former neighbors in Minneapolis

(Testimony of E. E. Amblad.)

—Mr. Bolden and Mr. and Mrs. Olsen. In fact, he has some pictures of the Bolden family which were in our booklet, and he wanted to know about them. I told him about what they were doing; that he had started in the poultry business and was getting along very nicely. I also told Mr. Johnson and Mrs. Johnson about the way our people developed their places. Everybody, of course, had a family orchard in connection with their places, and our horticultural adviser would assist them in laying out their grounds when they arrived, advise them in regard to planting trees, orchards, and, in general, beautifying the place. I told them of course about the City of Sacramento and the general surroundings of the country they would live in, so they would have a general idea of where they were going.

As I recall it, his main intention in coming out here was to go into the poultry business. Mrs. Johnson's health was poor and they wanted to make a change of climate on that account, [85] and so Johnson, being a first-class carpenter, knew that he could get work here, and going into the poultry business, they knew they could get along, but poultry was the main idea of coming out here as far as the purchase of their land was concerned.

We had a conversation regarding the cost of installation of poultry-houses. I went into that thoroughly. We have a model in my office—a working model of the Lyding Poultry House, in which is installed all the labor saving devices, the nesting system, the lighting and ventilation, and the speci-

(Testimony of E. E. Amblad.)

fications for material and the cost. Mr. Johnson, being a carpenter, figured that out and went into the matter quite thoroughly.

Q. Was there anything said at the time of any of your conversations with Mr. Johnson, or at any time when Mrs. Johnson was present, regarding the commercial planting of fruit?

A. Yes, it came up about the time we got around to a deal. As they have testified, they offered some property in Minneapolis, a lot in the suburbs, as part payment, and on the deal that I proposed to them they were required to take ten acres. Mrs. Johnson, in particular, objected to taking ten acres. She only wanted five, but I told her the way we were operating we could not make a deal on the basis of five acres, on account of it being a trade deal.

Of course, where people buy for cash, they can pay any amount they want, but where they trade we are limited to the kind of a deal we can make. That is the only deal I could offer. She objected to that because she didn't know what they would do with the other part of the land. I suggested that they could either sell that land out, or go into some special kind of fruit, and she would have to be governed entirely after she reached Rio Linda as to what they should plant. I told them all about Mr. [86] McNaughton, that I was not competent to advise what would grow on that particular piece of ground; that they would have to depend upon what he told them after they arrived. I didn't

(Testimony of E. E. Amblad.)

know about the lot they finally selected, and did not at any time tell them that land was adapted to any particular kind of fruit. They made an exchange after they reached here.

There was very little said about an orchard, the cost of planting, or anything of that kind. I did not discuss with them the depth of soil of any particular lot, except I told them the soil throughout the district was fairly uniform, but of varying depths to hard-pan. I told them there was hard-pan under all this land.

I had nothing to do with their selection of Lot Thirty-five in Subdivision Five. That was done after they arrived here. I made no statements to them about Lot Thirty-five, and did not discuss with them the depth of soil or fruit-growing possibility of that lot.

Cross-examination.

I was sales manager back there all this time, where they were selling land to people in the Twin Cities, Minnesota, North Dakota, Wisconsin and Canada. I talked to Mr. Emil Johnson at my office and I was in his home half a dozen times at least, I presume. He came to the office once with his brother, and I did go to his house and talk to Mrs. Johnson. I am sure that one conversation was had at the office, and later, when the contract was signed, he came to finish with Mr. Crinkley.

Q. Didn't you tell him that this land out here was fruit land?

(Testimony of E. E. Amblad.)

A. We didn't talk about fruit lands.

Q. You talked to Mrs. Johnson about buying five acres more which might be put into fruit?

A. Yes. [87]

Q. And you say you have not talked about fruit lands?

A. I want to change that in this way, that I did not recommend that particular lot to any kind of fruit, but I did suggest that later on, if they wanted to go into that, they could discuss it with their horticultural adviser, that he would suggest some orchard that would be suitable and possibly grow all right.

Q. You told them that the tract generally was adapted to all kinds of fruit?

A. Not this particular tract, but the whole Rio Linda district.

TESTIMONY OF M. A. CRINKLEY, FOR DEFENDANT.

M. A. CRINKLEY, a witness for defendant, testified:

I am Secretary of the Company and have been connected with it since the summer of 1915. I was appointed Secretary in 1916. I met Mr. Johnson, the plaintiff in this case, in the negotiations leading up to his purchase. At the time Mr. Amblad and Johnson had come to the point where Johnson wanted to take in the lot and only purchase five acres, and they couldn't get anywhere

(Testimony of M. A. Crinkley.)

on it; they came in to see me. Mrs. Johnson was not there. Mr. Johnson told me at that time his idea was to go into poultry. He did not need any more land than five acres for poultry. I said, all right, if that is what's on your mind, forget your lot and we will sell you five acres. He didn't want to do that, he insisted on traking the lot. I said if you want to trade the lot you will have to take ten acres. We have to resell these properties and it doesn't pay us to bother with it. As I recall it, he went out and later came in and signed a contract and put his down payment on that very lot. That is all I had to do with it.

We bought this land in 1912, twelve thousand acres. That is a map of Rio Linda subdivided. The red dots on the map [88] indicate a site for building, for some family living there. The condition of the land at the time we bought it was altogether unimproved. They were raising grain on some of it.

We first began the sale of land in August, 1912. Mr. Terkelson is one of our first customers. The lands were first offered for sale in California. We had an office in San Francisco and in Los Angeles for many years, and since that time we have continuously had these lands on the market. They are on the market to-day.

At the time of this transaction in 1923, between two and three hundred families had located on the Rio Linda colony. Our best estimate to-day is

(Testimony of M. A. Crinkley.)

around five hundred families. We paid eighty-five dollars an acre for part of the land, and a hundred dollars an acre for another part, in 1911 and 1912. Since then the company has spent a lot of money for development and improvement on the land. We built the roads there and kept them up all the time development was going on, put in culverts, put in bridges over the creeks. There is a stretch of bottom land meandering through there. Laid out the town site, spent a lot of money getting power in there; advanced forty thousand dollars to the power company to get the power extended faster than the power company wanted to in order to relieve these people of buying gasoline pumping plants and have them resell them and buying electric plants, and generally stood behind the development of the district right from the start. Now we have a sixty thousand dollar schoolhouse, with busses to pick up the children and carry them in. We advance money to the people of Rio Linda, and when the Rio Linda Poultry Association was formed, built a warehouse for them; installed the machinery; subsequently sold the plant to the people at less than what it cost us, and they have done [89] remarkably well, much better than we have. Our operations don't show a dollar of profit.

Q. What does the land stand you to-day, considering the cost and the money expended for development and in the way of taxes?

A. Just figuring the initial cost of the land and the taxes, the road building and grading, we have

(Testimony of M. A. Crinkley.)

done there, it stands us without any interest over two hundred dollars an acre.

Q. When you say without any interest on your money, you mean the interest on what you paid for it, regardless of other money expended?

A. Yes, sir.

Q. Do these figures include selling cost, or any of those items? A. No, sir.

Cross-examination.

Q. You have circulated literature such as is exhibited here in evidence all through the middle west, all through the States of Iowa, North Dakota, Minnesota and so on?

A. Canada, California, Nebraska, Kansas.

Q. You say this land cost eighty-five and a hundred dollars an acre. As a matter of fact, wasn't that bought years before you were connected with the company?

A. I already testified it was bought in 1911, and I became identified with the company in 1915.

Q. You didn't have anything to do with the sale? You weren't there when they made the transaction?

A. I wasn't there when they purchased the land.

Q. All you know about it is what somebody tells you? A. Let me finish my answer.

Q. Of your own knowledge. [90]

A. Yes, I know all about it.

Q. How do you know?

A. Mr. McCutchen, I came out in the year 1916 and paid to the Sacramento Valley Development

(Testimony of M. A. Crinkley.)

Company several hundred thousand dollars in cash, and if a man doing that doesn't know about the transaction, I don't know—

Q. You don't know of your own knowledge what has been paid him?

A. If I don't, how would I know how much to pay him in 1916?

The COURT.—Don't argue.

The WITNESS.—Now, your Honor, it is not fair—

The COURT.—He is asking you if what you knew, you knew by hearsay.

A. No, sir, it is hardly hearsay.

The COURT.—No argument.

Mr. McCUTCHEN.—I move to strike his testimony as to what was paid for the land.

The COURT.—It will be stricken.

Mr. HUSTON.—Exception.

Mr. McCUTCHEN.—Q. Mr. Crinkley, you have been practically the general manager for this concern ever since you were secretary.

A. Never had that title.

Q. You have been the managing officer?

A. I am the secretary of the company.

Q. Were you on the witness-stand here in the case of Elm *versus* Sacramento Suburban Fruit Lands Company? A. Yes, sir.

Q. You remember the occasion of Judge St. Sure asking you some questions? A. Yes, sir.

Q. I will ask you if this question was asked you and this answer given by you at that time:

(Testimony of M. A. Crinkley.)

"Q. Is this land you are selling out good fruit land?

A. Yes, I would say it was good land if [91] handled right."

Were you asked that question and did you give that answer?

A. Yes, sir, and I would make the same answer to-day.

Q. (Reading:)

"Q. What do you mean by 'if handled right'?

A. There is fruit in every subdivision we have here."

A. Perfectly true.

A. (Reading:)

"Q. Would you call it fruit land?

A. Yes, I would call it fruit land.

Q. You can raise fruit upon that land in such quantities as to make it profitable?

A. No, sir, we don't sell it that way."

A. Yes, sir, I said that. Can I explain that?

Q. (Reading:)

"Q. Commercially?

A. No, we don't sell it that way. We don't talk about raising it commercially."

Q. Did you make that answer?

A. Yes, sir, and I would like to explain that.

Mr. McCUTCHEN.—That is all.

Redirect Examination.

Mr. HUSTON.—Q. You can explain it.

A. We had been talking about talks with the

(Testimony of M. A. Crinkley.)

people back east, and I wanted to make it clear to Judge St. Sure that in discussing deals one after the other, I must have talked to fifty per cent of the people; not one of them has discussed the commercial raising of fruit, or had any idea at that time of going into the commercial fruit business, and I wanted to make that clear to the Judge.

Q. What about the statements about the fruit not being profitable?

A. There was no market at that time.

Q. That is what you referred to? [92]

A. Yes, sir, it is not possible to make a commercial profit out of fruit at that time.

Mr. HUSTON.—Counsel made a motion to strike out all the testimony as to the cost of this land and your Honor granted it. Does that take—

The COURT.—As to the cost. That cost is really no test as to the value, anyway.

Mr. HUSTON.—We save an exception.

Recross-examination.

Mr. McCUTCHEN.—Q. Do you know of this conversation with Mrs. Johnson about selecting the additional five acres?

A. No, I don't think I ever met Mrs. Johnson.

TESTIMONY OF CARRIE KLAFFENBACH, FOR PLAINTIFF (IN REBUTTAL).

CARRIE KLAFFENBACH, a witness for plaintiff, in rebuttal testified:

I live in Rio Linda. I had a conversation with

(Testimony of Carrie Klaffenbach.)

Mr. Jarvis in front of our place about June, 1927, about my land. He had been out there possibly a half hour and I went out, asked him if he was going to make an examination of our ten-acre tract as to the fruit growing possibilities. He said, "No, I won't take the time, because I know you have no fruit land here. You can't raise fruit commercially on this hard-pan land."

Cross-examination.

I am a plaintiff in an action now pending in this court.

TESTIMONY OF JACOB M. JOHNSON, FOR PLAINTIFF (IN REBUTTAL).

JACOB M. JOHNSON, a witness for plaintiff, in rebuttal, testified:

I formerly lived in Rio Linda. Formerly owned some land out there. I know Mr. E. P. Verner. I had conversation with him [93] in September, 1921, about the Rio Linda lands. That was coming in from Fair Oaks. He said he felt sorry I bought land in Rio Linda at two hundred fifty dollars an acre; that he could sell me land a whole lot cheaper. He said I paid too much for the land.

Cross-examination.

I am also a plaintiff in an action pending in this court.

TESTIMONY OF EMIL JOHNSON, FOR PLAINTIFF (RECALLED IN REBUTTAL).

EMIL JOHNSON, plaintiff, recalled in rebuttal, testified:

I know Mr. Jarvis. I had a talk with him at my place in June, 1927. He made some borings or tests on the soil there. I asked him if he thought that was a commercial proposition for raising fruit. He said no. Then I asked him what kind of things he would recommend. He said, "I don't know."

Before the Court's charge to the jury, defendant requested the following instructions, among others:

DEFENDANT'S INSTRUCTION No. 1.

You are instructed that this is what is commonly known as an action of deceit. The gist of the action is fraud. Fraud necessary to support the action exists where a person makes a false representation of a material fact, susceptible of knowledge knowing it to be false, with the intention to deceive the person to whom it is made, and the latter, relying upon it, acting with reasonable prudence, is deceived and induced to do or refrain from doing something to his pecuniary loss or damage. In order to support an action of this kind, it is necessary for the [94] plaintiff to satisfy the jury by a preponderance of the evidence, (1) that the defendant made a substantial, material representation respecting the transaction; (2) that it was

false; (3) that when it made it it knew it was false; (4) that it made it with the intention of inducing the plaintiff to act upon it; (5) that the plaintiff was misled thereby, and in reliance thereon, did act upon it, and he thereupon suffered damage. If you should find that the plaintiff has failed to prove any one or all of these essential elements, your verdict should be for the defendant.

DEFENDANT'S INSTRUCTION No. 3.

You are further instructed upon the matter of plaintiff's discovery of the alleged fraud that if plaintiff discovered that a material representation concerning the land he bought was false, then he was at once by that discovery presumed to have knowledge of the truth or falsity of the remaining representations, and must bring his action within three years of the discovery of the falsity of any material representation concerning the land.

DEFENDANT'S INSTRUCTION No. 4.

The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud.

It must appear from a preponderance of the evidence that the false representations, if any, were made by defendant with a fraudulent intent, and for the purpose of inducing the plaintiff to act upon them. [95]

DEFENDANT'S INSTRUCTION No. 6.

You are instructed that plaintiff cannot recover in this action unless he was deceived by the alleged representations, for if the means of knowledge are at hand, equally available to all parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of those means and opportunities, he will not be heard to say that he has been deceived, unless he was induced by trick or misrepresentation of defendant not to make such inspection.

DEFENDANT'S INSTRUCTION No. 9.

The Court instructs the jury that if a misrepresentation is not material, a person has no right to act upon it, and if he does he is not entitled to relief or redress on the grounds of fraud; the question is not whether the person to whom the representation was made deems it material, but the question is whether it was in fact material, and if the defendant in this case made representations which were false, and which at the time they were made he knew to be false, and if you find that such representations were not material and that the plaintiff in this case had no right to act upon them, the plaintiff cannot recover.

DEFENDANT'S INSTRUCTION No. 17.

You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiff must show that the fraud occurred within three

years of the commencement of his action for relief, or if his action was commenced more than three [96] years after the fraud occurred, then he must show, in order to maintain his suit, that he did not discover he had been defrauded until a date within three years of the time he commenced his action.

With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiff will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.

You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiff has proven by a preponderance of the evidence both that he did not discover the alleged fraud within the period of three years before he filed his action, and that he could not have discovered it by the exercise of reasonable diligence, three years before he commenced this suit. He was not permitted to remain inactive after the transaction was completed, but it was his duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to him. He is not excused from the making of such discovery even if the plaintiff in such action remains silent. A claim by the plaintiff of ignorance at one time of the alleged fraud and of knowledge at a time within three years of the commencement

of his action is not sufficient; a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do [97] so. If fraud occurred in this case it was complete when plaintiff contracted with defendant to buy land. Plaintiff commenced his action on 11th day of August, 1927; his contract with the defendant for the purchase of its land was made in February, 1923. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiff in the making of this contract, then before you can find a verdict in his favor, you must also believe from a preponderance of the evidence that he neither knew of the fraud nor could with reasonable diligence have discovered the fraud before a date three years prior to the commencement of his action, that is, before the 11th day of August, 1924. If you believe from a preponderance of the evidence that plaintiff either knew of the facts constituting the alleged fraud before August 11th, 1924, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant.

CHARGE TO THE JURY.

The COURT.—Gentlemen of the Jury, you have heard the evidence and the argument, and now it

is for the Court to deliver to you the instructions, and that means that the Court is to instruct you in the law that applies to this case, and in the light of which, in so far as the evidence is in conflict, you will determine the facts. Remember, you take the law from the Court, and the Court, and all of us, take the findings of fact from you.

The charge in this case is that the plaintiff, Emil Johnson, in 1923, purchased certain lands from the defendant, the land being located in this county, in the Rio Linda subdivision, colony or district, and the plaintiff alleges that he was induced [98] to buy that land by reason of certain false representations made to him by the defendant, amongst others that the land was worth $400 an acre, he buying ten acres of the land for $4,000, and that it was perfectly adapted to the raising of all kinds of fruits. There are other representations which plaintiff alleges, but these two are the two, if the proof sustains any, or sustains one of them, it is sufficient for plaintiff to rest on at this time.

The defendant denies that it made any such representations, denies that it represented the land worth $400 an acre, and denies that it represented the land was perfectly adapted to the raising of all kinds of fruits, that fruit-trees of all kinds would thrive and flourish thereon and produce an abundance of fruit.

The burden of proof is upon the plaintiff to prove substantially these allegations, or enough of them to make out his case before he can recover, and he must prove that by the greater weight of the evi-

dence, and of course when you ask yourself whether the plaintiff has proven these allegations by the greater weight of the evidence, you do not look at his evidence alone, but take into consideration all the evidence. If there is anything in the defendant's evidence that makes in behalf of plaintiff, he is entitled to the benefit of it, the same as if there is anything in plaintiff's evidence that makes in behalf of defendant, the defendant is entitled to the benefit of it. And after you have weighed and considered all the evidence in the case, then you determine whether the greater weight of it on these issues is with the plaintiff, and if it is, he is entitled to a verdict accordingly.

You may conceive, if you like, all that makes on behalf of plaintiff on one side of a scale, and all that makes in behalf of defendant in another side of the scale, and unless plaintiff's outweighs—if they remain in equipoise or the defendant's is the [99] heavier—unless plaintiff outweighs defendant, he has failed to prove his case, and defendant is entitled to a verdict.

No matter how good a cause of action any man may have, when he comes into court before a jury, he must be able to prove it by evidence. When the case is concluded, so far as the evidence is concerned, the greater weight of it must be with him, the plaintiff, or his good cause of action avails him nothing, and the opposing party is entitled to the verdict at your hands.

When it comes to determining the greater weight of the evidence, that involves, of course, the credi-

bility of the witnesses, your confidence in their ability to know and to remember, and in their honesty and accuracy in reporting the facts to you. You observe the witnesses, their demeanor, take note of their interest in the case—there is interest in the case in behalf of both parties here. Plaintiff of course is interested. The defendant's agents and officers of course are interested, and witnesses may display more or less partisanship in favor of a party, and you always ask yourselves if that interest or partisanship, if you see it, have influenced the witness so that his testimony is not fully to be relied upon or perhaps not at all, which is entirely for your determination. You take note of the reasonableness of a witness' statements to you, and the probability of them, because reasonableness and probability is a great test of truth.

The plaintiff is not obliged to prove his case to an absolute certainty, because that kind of proof is not possible in any case at all in a court of law. To prove a case beyond some degree of probability—even in a criminal case it is only a very high degree of probability. In this case the only proof required of the plaintiff is proof of an allegation beyond a [100] reasonable doubt. The burden of proof is with him. It is the evidence that you credit that counts in a case. The witness whom you believe—you are not obliged to believe a thing is so simply because some witness testifies it is so. Of course you can see that is only common sense, as well as law. If you were obliged to believe a thing because a witness testified it is true, when

two witnesses testifying to a particular thing each give testimony directly contradicting the other, you would be in a bad predicament. You would be compelled to believe both. No. You test a witness by all those tests which serve to determine whether a man is telling the truth, the same as you would in your daily life. I imagine all of you in such event would be capable of understanding whether you are being dealt with truthfully and honestly, to defeat the attempt of anyone to put anything over on you, and the way you determine the truthfulness of the men you deal with in daily life, you determine the truthfulness of witnesses on the witness-stand.

There is a maxim in law that if a witness testify falsely in any one particular, he may swear falsely in all, and you ought to distrust all the testimony of that witness, and if your judgment approves you may reject it all, because if his oath has not held him faithful to truth in one instance, how can you have any confidence that it would hold him faithful to truth in other instances. A man who takes a solemn oath to testify the truth, the whole truth, and nothing but the truth, if he violates it in one particular, he may well do that in others.

That will be material, because there has been an attempt on both sides to impeach witnesses, that is to say, to show that the witnesses have not testified truly on the witness-stand in some particular, and we will come to that later. If you find or this develops in respect to what any witness on either side has [101] said, then the maxim or rule of law

which I have stated to you will be applied by you.

Now, Gentlemen of the Jury, the parties have asked a great many instructions, that is to say, technical, abstract rules of law, to be given to you by the Court. I think that it will not be necessary to thus deal with the law. We will proceed to the case, and the Court will state the law in ordinary language as applied to the facts of the case, and I believe you will understand it better. That is the only object of the Court in delivering instructions and enlarging upon the law, is to reach the understanding of the jury so that it will know, and in the light of which, it will determine the facts.

Coming then to the case. In the first place, the plaintiff must prove by the greater weight of the evidence that these representations were made to him by the defendant's agents or officers. Of course the defendant, a corporation, can act only by agents or officers, and its agents or official representatives the defendant employs and is responsible for, just the same as *on* any one of you, if you send an agent out to do your business, whatever he represents in your behalf, you are responsible for, and take the consequences if it is untrue.

So coming to the representation that the land was worth $400 an acre. The plaintiff testifies that both Schei and Amblad told him that the lands in the Rio Linda district were worth $450 and $400 an acre, and though Schei and Amblad have both testified for the defendant, neither of them deny that they had made that statement to the plaintiff, so you see it can be well taken as true, unless you be-

lieve that plaintiff is not worthy of credit in that particular, at all, or in that particular. So that is how the evidence stands in respect to the representation that the land [102] was worth $400 an acre.

Therefore, coming to the other representation which I think I require particularly to point out to you, that the land was well adapted, perfectly adapted to the growing of fruits. Has the plaintiff proven that substantially?

Take this book which the defendant circulated in order to induce customers of course, and we find that statement in substance has been made in the book, and furthermore the plaintiff testified that Amblad told him the same thing, and Amblad admitted it to all intents and purposes when upon the witness-stand. Amblad says he did tell the plaintiff that—I don't remember in just what order these witnesses testified—yes, he says: "I did tell him that the district generally was adapted to all kinds of fruit, though I didn't tell him this particular piece or any particular piece was adapted to any particular kind of fruit. Told him the soil was all alike in the district." And you come to the book, and we find the same statement made. For instance, this page 6 of the book, in what purports to be a letter from the Horticultural Commissioner, it says: "The splendid growth and the excessive yield obtained during the past five or six years has proven beyond a doubt that this district is well adapted for the commercial growing of almonds, pears, peaches, olives, cherries, grapes, plums, figs

and berries," and the like; the deciduous fruits is what this plaintiff claims this land was represented to him as valuable for, and that it is not.

Now, there is no evidence that this letter was written by the Horticultural Commissioner, and it doesn't make any difference, for whatever the defendant puts out as the statement of others, it is its own statement and is responsible for the statement thus made, because it prints it and presents it to the customer. [103]

Going to page 9 of this book, we find the statement that the land is well adapted to the successful growing of peaches and the like, and then it says he ought to arrange for the planting of the family orchard first, and then put the rest of his acreage in some particular kind, after consultation with the horticultural department, and the kind preferred by the customer. It doesn't say that the land will only grow a particular kind—you remember that these representations are to be reasonably interpreted, as you believe a customer would understand them. If the defendant uses ambiguous language in his literature, in the statements it makes, they are bound by it, when they are representing things as facts.

Then again, on page 10 of the pamphlet, it says: "The orchard trees may be expected to produce the second and third years, and commercially from the fifth to the sixth years." You see, the company was representing that this land was well adapted to the commercially raising of these deciduous fruits. From the fifth to the sixth year—fifth to

the seventh year, and there would be time allowed to a customer to settle or to test out by practical experience whether that representation was made good, "would come into commercial bearing in five or six years."

So, Gentlemen of the Jury, the only interpretation that can be placed upon the representation made by the defendant in its book and by its agent is that it did represent that the land was well adapted for the successful raising of the deciduous fruits commercially, and that substantially proves the representation which the plaintiff in his complaint alleges was made to him, and on the strength of which he says he bought the land.

Taking that as proven, then, Gentlemen of the Jury, you will proceed to the next step. Was the representation believed by the plaintiff? Well, he says he believed it. Ask yourself, "Isn't [104] it probable that he believed it?" He was a Minnesota man. This was made known to him in the depth of winter, when California would be very attractive to people down there. He doubtless wanted to believe it. That's all right. He is not at fault. He has a right to believe he is dealing with honest men, or with men that would not misrepresent, and if these representations were made to him, he had a right to believe and rely on them, as he says he did. And is not that the reasonable and probable likelihood that he did, because he had never seen the land? He was dealing with experts. The defendant holds itself out as supplied with experts, orchardists and the like, who know what

they are talking about. So did he believe it? The law says it ought to be inferred in such circumstances that he did believe it, and I think you can take it that he did believe it.

Did it contribute to inducing him to buy the land? Of course, if he would have bought this land regardless of these representations that the land was worth so much money, and that it was well adapted for commercial orchard, if he would have bought anyhow, then these representations did not influence him and did not damage him, because that is the law. If he had bought the land regardless of these representations, not induced by them to buy, then his case falls. Was he induced by them? Remember, the representations were made to induce him to buy, to influence him, were they not? That's the object of this circular, and the object of the company's agents' statements to him, to influence and induce him to buy, and it is the reasonable and the only reasonable inference, it seems to me, that it did influence him to buy.

It is now time to talk about poultry. The books tell him he ought to raise poultry the first thing, to get an immediate income until such time as he is able to embark in fruit. The first [105] time that the orchard will bear commercially, the book says, is the fifth to the seventh year. Moreover, the plaintiff testified—and his wife—that they only wanted five acres, but defendant's agents, including Crinkley, insisted they should take ten, that the other five could be especially devoted to fruit for commercial orchard. The plaintiff testified to

that, and there is no denial on the part of defendant that that representation was made to him. Indeed, Crinkley says that he insisted that he should take ten acres because of his trade they were making, and Amblad didn't deny that, as I remember it.

If the Court's memory is at fault, and you remember the testimony otherwise, Gentlemen of the Jury, it is your memory finally that controls, and if any time there is a doubt in your own minds, you have the right to call for the record and have it read over.

So taking it, if you do, that plaintiff was induced to buy by these representations—remember that the representation need not be the sole inducement. If it was represented to him as having many inducements, he had a right to be influenced by them all. The experts of the defendant said that all of these advantages attached value to the land. These representations were material expressions of fact. As a matter of law, the Court will tell you that, stated under the circumstances that they were—the land was told to him to be valuable for poultry, for fruit, valuable by reason of its contiguity to your city here, and the experts' advice that he would receive while there cultivating the land, he had a right to all these things which were told him the land was desirable for. Even if he didn't desire to go immediately into the commercial orchard, it attached value to the land in the judgment of any man. If you are buying a piece of land, you are [106] glad it is valuable for as many different

things as possible, for the more readily you will find a market for it some time. More likely to have a success with the land as a whole, because if you fail with one thing, you will succeed with another. So with this plaintiff.

So if you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff, and influenced him to buy, then you proceed to the next step, which is: Did the defendant know the falsity of the representations, if they were false, which we will come to later? In these books they represented that it was already proven that the land was adapted to the commercial raising of fruit. There they state it as a fact. If it was not, it ought to be inferred that they knew, because they had every opportunity to know. The land was there. Moreover, if they didn't know it was false, all under the circumstances, considering their relation to the land and their opportunities and their general knowledge, if they ought to have known, it is the same thing as if they did know, because no one inducing another to enter into a bargain can make a positive assertion of fact contrary to the truth if they are culpably negligent in not knowing the truth, and *and* I think you will agree the defendant was in this particular case. That is for your judgment, moulding it by what you would know or ought to know in like circumstances if you were in the position of a company thus handling and dealing with lands over a period of ten years.

That decided against the company, if you do, Gentlemen of the Jury, namely, that they knew it

was false, or ought to have known, these representations, if they were false, then comes the next step. Were these representations false, untrue? That is the big issue in the case. Were the lands worth $400 an acre? You [107] have the evidence on both sides in respect to that, and the circumstances, which will enable you to form a judgment of your own as reasonable men of some knowledge of affairs, beyond question, businessmen or workingmen, whichever you are. Take into consideration everything that made for the value of the land in 1923. That's the test, when the bargain was made, February, 1923. Take into the case the representations made, as he says and which was not denied, in the testimony or evidence, that it was worth $400 an acre. Was it? The expert for the plaintiff, Kerr, introduced by him, testified that those lands were worth $50 and $75 an acre, $50 to $75 an acre, and he gives you what he takes into account. He takes into account everything that makes for value in the way of a home; he says for raising poultry, nearness to Sacramento, transportation, light, power, and the like, settling up of the community, the advices that he might get from the experts. And you must remember in that connection that the company didn't bind itself to give any expert advice, though it promised it, and so far as it appears it has so far rendered it. As long as it has lots to sell, of course it would stand it in hand to continue that advice, but it never bound itself to continue for a day set, expert advice.

But Kerr says he takes all that into considera-

tion, and that the land is not worth, in his judgment, over $50 or $75.

Then plaintiff's own testimony is that the fruit-trees, because of the shallowness of the soil, after a short period of time died off, and the testimony of his expert, Mr. Davis, is the land is not successfully adapted to raising fruit, for shallow soil, and hence, if not successfully adapted to raise fruit, commercially, where is the $400 value? [108]

The defendant introduced two experts, Verner and Traxler. Mr. Verner says it is worth $400 or $375, perhaps—I am not certain—yes, Mr. Verner says the land at that time was worth $375 an acre, and he takes into consideration all these matters of location, railroads, electric power, high land, not subject to flood, roads, and the like, and he is asked, and this is one of the places where plaintiff attempted to impeach the witness first, Verner is asked if he didn't tell Johnson, who owns land in that Rio Linda district, that if he paid $250 for his land he paid too much. Verner says he didn't. Johnson came on the witness-stand and says he did. If you believe Johnson instead of Verner, then remember that maxim of the law about a witness who testifies falsely in one particular will be distrusted in others, and you can reject it all, if you see fit.

Moreover, if Verner has told Johnson that $250 an acre was too much, what is his testimony that it was worth $375 an acre worth at this time? Inconsistent statements, Gentlemen of the Jury, may be taken into account in determining the value of a

witness' statements upon the stand. If upon the outside he states the land is too high at $250 an acre, then when he comes in to testify for the defendant and says under oath that it is worth $375 an acre, it is for you to determine how much credit you will give to his opinion as to the value at this time of $375 an acre. It is a matter for the judgment of the jury.

Then the other expert in behalf of defendant, Mr. Traxler, had had lands out in that same locality, a little nearer the city, and his judgment and opinion, as he expresses it to you, is that the land was worth $400 an acre at that time, in 1923, and he tells [109] you why, what the land will produce, and the location, and defendant's experts' advice, and transportation and the like.

You see, Mr. Traxler includes in his value of the land the fact that the customer or purchaser, the plaintiff, will get expert advice from defendant, and on cross-examination he was asked about that, and he says that he puts the value of this expert advice as just about almost as much as the land is worth. If that could be adopted, then Traxler considers the land, without the advice, as something over $200 an acre, and the balance of his $400 is made up of the experts' advice. That is a reasonable interpretation to put upon his language. That is what he said, and it is for you to say. Remember, an expert's advice, so far as property, has an element of value, but was it worth nearly as much as the land, and do you consider that Traxler said it

was worth $200 at that time, or was the balance, as he said it, made up of the experts' advice.

Now, the defendant has introduced quite a number of witnesses to show what they claim is the productiveness of the land adjacent thereto, and it is agreed that all these lands in Rio Linda are about the same. The defendant maintains and insists that plaintiff's land is worth about the same, and hence it was worth $400 an acre.

You must remember this, Gentlemen of the Jury. In dealing with experts' testimony on both sides, or any other witness in respect to opinion on values, you are not bound by an expert's opinion. That is to say, you are not bound to accept it if you do not have confidence in it or give credit to it. An expert is like any other witness, but he is assumed to have special knowledge [110] by reason of dealing in that kind of land, these expert realtors, and he is assumed thus to better know the value. You give respect to any man's learning, as far as appears, and then take into account your confidence in his ability to know and honestly report to you, if you have any such, and then determine for yourself what is the value of the land. It is for you to say how much this land is worth.

If you find it was worth $400 an acre at the time plaintiff bought it, he is out of court, because no matter what was represented to him, he hasn't been damaged. A man is not entitled to maintain such a suit unless he has been damaged, and his damage is the difference beween what he paid and what he secured. So when he paid $400, if he got land

worth $400 an acre, then he hasn't been damaged, and he must go out of court.

If you should determine, however, that the land was worth less than what he paid for it, $400 an acre, then you proceed to determine the question whether the land was, as represented, adapted to the successful commercial orcharding enterprise.

In respect to that, the plaintiff tells you how he made an endeavor to raise trees. He has given them the best of care, irrigated, cultivated, sprayed, and the like, but after a year or two they began to die. Of 65 trees he planted in '24, one had died in 1925, two in 1926, fourteen in 1927, and two more in 1928, making a total of some nineteen trees out of sixty-five having died. Some were replantings, I think he said.

He also presented to you the testimony of Mr. Davis, agricultural specialist, who tells you that he has examined this land, that the soil is what he terms to be shallow, that it averages only about 24 inches in depth, and that includes four or five inches of clay on the bottom, and then he says you come to [111] hard-pan, samples of which he put in evidence before you, and that that hard-pan is exposed in the well pit twelve or thirteen feet, and not hit bottom. Mr. Davis tells you that that land, from his experience as a practical orchardist, is not adapted to commercial orcharding, because the soil is too shallow, and doesn't accord the necessary opportunity for the roots of growing trees to feed over a series of years that an orchard ought to live in order to be commercial. It doesn't afford suffi-

cient anchorage for the roots or sufficient conservation of the moisture, and sufficient area to hold the moisture, and the hard-pan prevents the roots from going down below that average of 24 inches that he tells you.

He tells you this hard-pan, if you try to blast it, since it is too thick to blast through with any reasonable effort, and that's all anyone is required to make, would form what he terms a pot hole, too deep to blow it through, and this would collect the rains, the moisture, affect the drainage, wouldn't allow the moisture to drain off if there was a surplus, and affect the roots of the trees and kill them. He further tells you he has raised fruit on this shallow land, and found it not successful.

He further tells you that a successful commercial orchard comes into bearing in four to ten years, and the defendant says five to seven years. Of course there is expense attached, which creates an overhead, and requires, in order to be successful, that the orchard shall live and bear a sufficient period in the future to balance not only the cost for that time, but the preliminary cost of bringing it to that point, and he says the trees won't live long enough on that shallow land to do that. He says something about a tree, where the soil would be only one [112] foot, dying in one year, two feet in two years, something like that.

On the other hand, the defendant introduces many witnesses who have not grown commercially in Rio Linda, but separate trees. They tell you the trees do well, bear well, fruit of good quaility, and

in quantity, and it introduces at least one, Traxler, who speaks of having a commercial orchard upon this land of some number of acres. Mr. Traxler testified that he had—not Traxler, either, that I had in mind for the moment. Turkleson. Mr. Turkleson has lived on this land fifteen years. He has 40 acres. He tells you the soil is three to eight feet deep on his land. On the plaintiff's it only averages 24 inches. That he has three acres of pears that are thirteen year old. He doesn't tell you whether it is on the three-foot depth or the eight-foot depth. It might well be on the eight-foot depth. Testifying as an owner of a commercial orchard, Mr. Davis says five feet is sufficient for a commercial orchard, and you cannot guess that Mr. Turkleson's orchard is on the shallow soil, because when a man puts a witness on the stand he must make the truth known, the fact known, and not let you guess at it. A guess that it was on the three-foot depth wouldn't be a bit better than that it was on the eight-foot depth. If on the eight-foot, it detracts largely from Mr. Turkleson's testimony, of course, because his soil is no such depth as that of the plaintiff.

This three-acre pear orchard, according to Turkleson's statement, has done very well, produced fifteen to twenty tons one year. Last year was a failure. Generally a good crop. And on the strength of that he says it was good fruit land. But, as I said, the value of Turkleson's testimony for the defendant rests [113] on the fact that it was on shallow soil, and there is no evidence that it was, and you cannot guess that it was.

Other evidence is that of Twining, the chemist, who examined the land. He says the hard-pan is under the surface eight to forty inches, two spots eight inches. It averaged 24 to 30 inches, about the same as Davis said. In other words, Twining says from eighty to forty inches down to hard-pan. He produces a sample of hard-pan, which he said is a thin shell, easily broken by blasting, and the rest is soft enough to disintegrate when exposed to atmosphere and water, and itself furnish the food elements. But you remember Davis' testimony that the well pit showed 12 to 13 feet in depth and hasn't disintegrated. Standing as it would ordinarily in the well pit, it certainly would be exposed to atmosphere, if not also to the moisture, and no one has said that that well pit doesn't stand solid as originally sunk, as Davis said it did, no one for the defendant.

Mr. Twining also says, properly prepared this land will produce commercial orchards, allow fruit to be raised commercially, and he means by "properly prepared" blasting, cultivating, and so on, and blasting will cost some thirty dollars an acre. He says he thinks it can be blasted through for thirty dollars an acre, so the land will raise fruit in commercial quantities. He says there is no arbitrary standard that five feet is essential. Mr. Davis didn't say that was an arbitrary standard, that to his experience and judgment that it takes land that deep to give long life, sufficient to render it successful for commercial orchards.

The defendant also introduced Mr. Morley, who

examined this and other lands. He tells you of certain lands that they examined, where the land was doing well, and which he believes are [114] commercial orchards, though he doesn't know of his own knowledge, and that he saw good fruit crops, good in size, good in quality and in amount, and, properly blasted, this land of the plaintiffs ought to be fit for commercial orchards. So does Jarvis, the horticulturist, who testifies to how many commercial trees, as he calls it, upon this Rio Linda project, about 53,000, and properly prepared it is adapted to the commercial growing of fruit. Says that five feet is better adapted, but this is still adapted at the depth they found.

Then further effort is made by plaintiff to impeach Mr. Jarvis, and he is asked if a year ago he didn't examine this land and go on Mrs. Klaffenbach's land, who has land in this colony, and if he didn't tell her—this land is all assumed to be of like character—that he wouldn't test her land, that it wasn't any use, only twenty-four inches of soil, that it wasn't adapted for the commercial growing of fruit. Jarvis says he didn't say that. She goes on the stand and testified that he did. Jarvis is also asked if he didn't tell this plaintiff that his lands were not adapted to the commercial growing of fruit. Mr. Jarvis says he didn't say that. The plaintiff takes the stand and says he did.

There puts to you again the question of credibility of these witnesses. Do you believe Jarvis or do you believe Mrs. Klaffenbach and the plaintiff? Because if Jarvis made those statements and denies them now, he denies them either wilfully or through

forgetfulness, either of which would bring in play the maxim that I mentioned, false in one would cause you to distrust all his testimony, and reject it if you see fit. Moreover, a year ago when he was not a witness in the case, if he told these people that these lands were shallow, 24 inches deep, and the property was not adapted to commercial orchards, ask yourself how much [115] credit you give his word now that it is adapted to commercial orchards.

The Court cannot decide that for you. It cannot undertake to do so. Sometimes the Court may express its opinion, but it does not do so with the hope or expectation to bind you to its opinion, but with the hope that it may help you to reason out the case to a successful conclusion. So between these witnesses you must remember the other two witnesses are interested in the case. The plaintiff has a large interest in the case, the same as defendant, and the Johnson who testified for him, or Mr. Klaffenbach who testified for the plaintiff also has a suit against the defendant.

Other witnesses express their opinion that the land is adapted to commercial orchards, among them Traxler, who testified to certain knowledge that he has, including something was told him. I think what was told him by others was stricken out. He claims to know and testifies that he knows that out in that section, where there is a little difference in soil, and the same hard-pan beneath, that the lands will raise fruits in commercial quantities. He tells of a certain orchard, Stout, eleven acres that he blasted and raised peaches, plums, and

'cots, as fine an orchard as you will find anywhere in the country, six tons to the acre, that he sold at $80 a ton.

Whether land is successfully adapted to the commercial growing of fruits of course cannot depend upon marketing altogether. It implies, or would involve land that with reasonable care and diligence would raise a crop in honest quality and quantity, reasonably sufficient at reasonable prices to make a profit. If for some sudden fluctuation in the market fruit becomes worth nothing, that wouldn't deprive land of its adaptability for commercial orchards. On the other hand, because of a sudden [116] fluctuation, fruit would go up to a higher price, the fact that some land, not otherwise adapted to the growing of fruit, produced a small crop that sold at a good profit, that wouldn't necessarily make the land adaptable for the commercial growing of fruit. It is a matter for considered judgment and average knowledge of men in the jury-box.

So now, Gentlemen of the Jury, has the plaintiff proved that the land is not adapted to commercial orchards? On taking the whole evidence, is the greater weight of it with plaintiff, that the land is not adapted to commercial orchards? If it is, he has proven his case, and is entitled to your verdict, and if he has not proven that by the greater weight of the evidence, he has failed to prove his case, and the defendant is entitled to your verdict. There would be no false representation to that, and unless you find the value was misrepresented, as I

able person would find, by such reasonable diligence as in your judgment he ought to have exercised at the time. But remember that the representation that the land was fitted for commercial orchards was a matter not obvious by merely looking at it. That was a matter for experts, because you see how the experts disagree even in this case to-day, and the mere fact that one might know and discover there was hard-pan a few feet below the surface would not be enough to impress the average man, a man of the intelligence of the plaintiff. You take into account who the plaintiff was. He wasn't a farmer, an easterner, and you measure his diligence in discovering the truth by all the circumstances in the case. He discovered this hard-pan some time in 1923 when he dug his well pit, but if he had any suspicion, if that was enough to put him on notice, he says he was disarmed from diligence by the statement to him of McNaughton. "Why, that hard-pan is not an injury. It is a benefit. It will furnish fertilization for the trees." The defendant answers that, "Take this hard-pan, break it up, and it is as good as the top soil, and it will keep down the moisture." That is to say, I mean it would keep the moisture in the ground. Undoubtedly it will hold water as it stands. It prevents seepage of moisture. The experts all agree that—both the experts for plaintiff and the experts for defendant say it must be broken, while the plaintiff says it can't [119] be broken through and allow the moisture to seep off. Was he told by McNaughton in 1923 that the hard-pan was a benefit, and rea-

sons given? Would not that excuse him from further investigation? If investigation on his part would have been likely to have discovered the truth? That is for your judgment. Consider yourself in his place, his knowledge or lack of knowledge, his previous occupation and all that he has read, first in this circular of defendant, and what defendant had told him. Take that into account.

Moreover, he is told by the circular that to bring an orchard to bearing takes five to seven years. He has a right to test it out. He wouldn't be obliged to grasp and believe anybody's statement if he heard it, that it was not adapted to commercial orchards, and he would have five to seven years, according to defendant's theory, to test it out, if he didn't otherwise find out it was not adapted to commercial orchards. He says he planted his trees in 1924, and seeing them die, as they did, mostly in 1927, his theory is that it was then when he discovered, and only then, that the land was not adapted to the commercial growing of fruit.

As I said, if he did not discover the fact, and there was no culpable negligence for not discovering it up to August 11, 1924, his suit is in time.

Now, put yourself in his place and consider all the evidence when you decide that.

There was an attempt to impeach the plaintiff which I overlooked, and I must tell you about it now. That is, the plaintiff was asked if he hadn't written to people on the project before he came out, for information in regard to the land, and he said that he hadn't, but his wife wrote to somebody and

didn't get any answer. The defendant put Bolden on the stand, who says he [120] received a letter from plaintiff, and answered it, and when plaintiff came out he admitted he received it. The same rule would apply, the maxim. If you believe Bolden instead of plaintiff, that the plaintiff did write the letter, whether the plaintiff destroyed it, and the plaintiff admitted receiving the answer when he got out here, then you have the right to distrust his testimony. But remember, if the plaintiff falsified in respect to that, it does not do away with the practical admission of defendant that the representations were made, and you can test out the question on other theories.

That concludes the instructions. When you retire to the jury-room you will select one of your number as foreman. It takes twelve to agree upon any verdict. Any exceptions for plaintiff?

Mr. McCUTCHEN.—None.

The COURT.—Any exceptions for defendant?

Mr. BUTLER.—Except to the Court's instructions on the question of representations claimed to have been made. First as to value; second as to the question of perfect adaptation for raising all kinds of fruit; third as to the raising commercially. Except to the Court's instructions on the question of belief of plaintiff in the representations as an inducement and the representations having been made to induce him to buy. Also upon the knowledge of falsity of the representations, and the neglect of the Court to instruct on the question of intent. Next on the question of the falsity of the representations both as to value, adaptability to

fruit, and the commercial raising of fruit. Next upon the question of productivity. Except to the Court's instructions on the question of the statute of limitations, and the refusal of the Court to give instructions on the statute of limitations as proposed by defendant. [121]

The COURT.—I think, Gentlemen of the Jury, the Court will refer to this matter of intent. I overlooked that, perhaps, or didn't think it was necessary.

The defendant must have intended that its representations should have been relied upon. It is for you to say whether the defendant did intend. What did it issue the circular for, making these representations, and what did its agents make them for, except with the intent that the plaintiff would believe and rely upon them? That's only common sense, as well as law, and that is all the intent that is necessary to make the representations fraudulent, and the defendant guilty of fraud, if they are proven. Any further exceptions?

Mr. BUTLER.—None.

(The jury then retired to deliberate upon its verdict.)

Defendant proposes the foregoing as its bill of exceptions on appeal from the judgment in said cause, and prays that it be allowed and settled as such.

BUTLER, VAN DYKE & DESMOND,
ARTHUR C. HUSTON,
Attorneys for Defendant and Appellant.

Dated: October 24, 1928. [122]

[Title of Court and Cause.]

STIPULATION FOR SETTLEMENT OF BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correct and may be signed and settled as such upon appeal.

Dated: November 17th, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
Attorneys for Plaintiff.
ARTHUR C. HUSTON,
BUTLER, VAN DYKE & DESMOND,
Attorneys for Defendant.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions do not appear in the record of said cause, I, A. F. St. Sure, Judge of the District Court, upon the stipulation of the parties, have settled and signed the said bill, and have ordered that the same be made a part of the record of the said cause, this 21st day of November, 1928.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Nov. 23, 1928. [123]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FOR SUPERSEDEAS AND COST BOND.

On the filing by defendant of a petition for appeal, with assignment of errors, and on motion of defendant, by its attorneys, IT IS HEREBY ORDERED:

That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered herein be, and the same is hereby, allowed.

AND IT IS FURTHER ORDERED that upon the giving by defendant of a good and sufficient bond in the sum of Three Thousand Seven Hundred ($3,700.00) Dollars, and conditioned as required by law, and the rules of this Court, all further proceedings in the said court may be suspended and stayed until the final determination of said appeal by the United States Circuit Court of Appeals or by the Supreme Court of the United States upon a petition for writ of certiorari.

IT IS FURTHER ORDERED that the amount of cost bond on said appeal be, and it hereby is, fixed in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned as required by law and the rules of this Court.

The supersedeas and cost bond may be embraced in one document.

Dated: October 25th, 1928.

BOURQUIN,
United States District Judge. [124]

Service hereof is hereby admitted and receipt of copy acknowledged this 25th day of October, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
OTIS D. BABCOCK,
Attorneys for Pltf.

[Endorsed]: Filed Oct. 25, 1928. [125]

[Title of Court and Cause.]

SUPERSEDEAS BOND AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Sacramento Suburban Fruit Lands Company, a corporation organized and existing under the laws of the State of Minnesota, as principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, and authorized under the laws of the State of California and the above-entitled District, to act as sole surety on undertakings of this character, as surety, are held and firmly bound unto Emil Johnson, the above-entitled plaintiff, in the full and just sum of Three Thousand Nine Hundred Fifty ($3,950.00) Dollars, to be paid to the said Emil Johnson, his attorneys, executors, administrators or assigns; to which payment, well and truly

to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of October, 1928.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Northern Division, Second [126] Division thereof, in a suit pending in said court between said Emil Johnson, as plaintiff, and Sacramento Suburban Fruit Lands Company, as defendant, a judgment was rendered against the said Sacramento Suburban Fruit Lands Company in the sum of One Thousand Eight Hundred Fifty ($1,850.00) Dollars, and in the further sum of costs amounting to $30.85, and the defendant having been allowed an appeal from the judgment to the United States Circuit Court of Appeals for the Ninth Circuit; and the Court having made an order for supersedeas, staying all proceedings in the District Court pending final determination of said appeal, provided the defendant give a bond in the sum of Three Thousand Seven Hundred ($3,700.00) Dollars, conditioned according to law; and the Court having fixed the amount of cost bond on said appeal in the sum of Two Hundred Fifty ($250.00) Dollars; and the Court having ordered that the supersedeas bond and bond for costs might be combined and embraced in one document,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Sacramento Suburban Fruit Lands Company shall prosecute its said appeal to effect, and answer all damages and costs

if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

AND IT IS FURTHER EXPRESSLY AGREED by said surety that in case of a breach of any condition hereof, the above-entitled court may, upon notice to said surety of not less than ten (10) days, proceed summarily in the action in which this bond is given to ascertain the amount which said surety is bound to pay on account of such breach, and to render judgment therefor against it and to award execution therefor.

IN WITNESS WHEREOF, said principal and surety have [127] executed this undertaking, attesting such execution by their respective seals, all on this, the 25th day of October, 1928.

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a Corporation.

[Seal] By A. E. WEST.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation.

[Seal] By J. W. S. BUTLER, Attorney-in-fact.

State of California,
County of Sacramento,—ss.

On this 25th day of October, 1928, before me, a notary public in and for the county of Sacramento, State of California, personally appeared J. W. S. Butler, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Standard Accident Insurance Company, and he acknowledged to me that he subscribed

the name of Standard Accident Insurance Company thereto as principal and his own name as the attorney-in-fact.

[Seal] GERALD M. DESMOND,
Notary Public in and for the County of Sacramento, State of California.

Form of bond and sufficiency of sureties approved:
Dated: ——————————.

——————————,
Judge.

Aprvd.

BOURQUIN, J.

[Endorsed]: Filed Oct. 25, 1928. [128]

[Title of Court and Cause.]

ORDER TRANSMITTING EXHIBITS.

It appearing to the Court that the exhibits of plaintiff and defendant, except the perishable exhibits and samples of hard-pan should be inspected by the United States Circuit Court of Appeals for the Ninth Circuit in their original form.—

IT IS HEREBY ORDERED that said exhibits, except the perishable exhibits and samples of hard-pan, be transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit in original form, with the bill of exceptions, and need not be printed as part of the record herein.

Dated: Jan. 14th, 1929.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 14, 1929. [129]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of Said Court:

Sir: Please prepare a record on appeal containing true copies of the following papers in the above-entitled action:

1. Order removing said cause from the Superior Court of the State of California to the District Court of the United States.
2. Complaint.
3. Demurrer to complaint.
4. Order overruling demurrer.
5. Answer.
6. Minutes of trial.
7. Verdict of the jury.
8. Judgment.
9. Petition for appeal.
10. Assignment of errors.
11. Bill of exceptions.
12. Order allowing appeal.
13. Citation.
14. Supersedeas and cost bond.
15. Order transmitting exhibits.

16. Praecipe for transcript.

BUTLER, VAN DYKE & DESMOND,
J. W. S. BUTLER,
ARTHUR C. HUSTON,
Attorneys for Defendant and Appellant. [130]

Service hereof is hereby admitted and receipt of copy acknowledged this 10th day of January, 1929.

RALPH H. LEWIS,
GEO. E. McCUTCHEN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 11, 1929. [131]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 131 pages, numbered from 1 to 131, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Emil Johnson vs. Sacramento Suburban Fruit Lands Company, No. 423—Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Fifty-six and 00/100 ($56.00) Dollars,

and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of January, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [132]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Emil Johnson, Appellee, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Sacramento Suburban Fruit Lands Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated this 25th day of October, A. D. 1928.

BOURQUIN,
United States Judge. [133]

Service of within citation admitted this 25th day of October, 1928.

RALPH H. LEWIS,
GEORGE E. McCUTCHEN,
OTIS D. BABCOCK,
Attorneys for Appellee.

Citation on Appeal. Filed Oct. 25, 1928.

[Endorsed]: No. 5692. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Suburban Fruit Lands Company, a Corporation, Appellant, vs. Emil Johnson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed January 16, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

/ 7

No. 5692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),

Appellant,

vs.

EMIL JOHNSON,

Appellee.

BRIEF FOR APPELLANT.

BUTLER, VAN DYKE & DESMOND,
Capital National Bank Building, Sacramento,
ARTHUR C. HUSTON,
Woodland,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 5692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),

Appellant,

vs.

EMIL JOHNSON,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

By complaint filed August 11, 1927, plaintiff prayed for the recovery of damages in the sum of nine thousand ($9000.00) dollars for a fraud alleged to have been committed by the defendant in the exchange of a tract of land in the Rio Linda Colony near Sacramento for a tract of land in the State of Minnesota, in February, 1923.

It is alleged that appellant represented to the appellee that the land in question was rich and fertile; was capable of producing all sorts of farm products and crops; was entirely free from all conditions and things injurious or harmful to the growth of fruit trees; that the land was perfectly adapted to the rais-

ing of all kinds of fruits, and would produce an abundance of fruit of the finest quality.

It is then averred that these representations were untrue and that the real value of the land was $150.00.

A general demurrer was interposed and overruled.

Then appellant answered, denying the allegations of the complaint.

The case was tried by a jury and a verdict was rendered in favor of the plaintiff for $1850.00.

SPECIFICATION OF ERRORS.

I.

The Court erred in overruling the demurrer to the complaint.

II.

The Court erred in sustaining an objection to questions asked the witness, H. M. Edmunds. (Page 20 of Transcript.)

III.

The Court erred in sustaining an objection to questions asked Lambert Hagel. (Page 21 of Transcript.)

IV.

The Court erred in sustaining an objection to a question asked E. M. Traxler. (Page 22 of Transcript.)

V.

The Court erred in striking out part of the testimony of M. A. Crinkley. (Page 23 of Transcript.)

VI.

The Court erred in instructing the jury on the question of representations alleged to have been made by defendant. (Transcript, page 25.)

VII.

The Court erred in refusing to give defendant's proposed instruction on the question of intent. (Transcript, page 26.)

VIII.

The Court erred in instructing the jury that the alleged representations induced plaintiff to buy. (Transcript, page 25.)

IX.

The Court erred in instructing the jury on the question of the statute of limitations and in the instructions given by the Court upon that subject. (Transcript, page 27.)

X.

The Court erred in instructing the jury on the subject of inducement. (Transcript, page 26.)

I.

THE COURT ERRED IN OVERRULING THE DEMURRER TO THE COMPLAINT.

The cause of action is barred on its face unless the running of the statute is avoided by pleading appropriate facts showing that the fraud was not discovered within three years prior to the filing of the

action. No such facts are pleaded. The only statement on the subject is, "that plaintiff did not discover the falsity of said representations until the spring of 1927." This point is fully presented in the authorities cited in the appeal filed in this Court in the case of *Sacramento Suburban Fruit Lands Company, a corporation, appellant, v. Walter A. Melin, appellee,* No. 5671. We refer to that argument and adopt the same as a part of this brief.

II.

THE COURT ERRED IN THE RULING EXCLUDING THE TESTIMONY OF THE WITNESS H. M. EDMUNDS.

The witness testified as follows:

> "Q. What in your opinion would be the value of land in the district in which the Emil Johnson property is located in the month of February, 1923?
>
> Mr. McCUTCHEN. Objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid.
>
> The COURT. I hardly think the competency of the witness has been shown. Objection sustained.
>
> Mr. BUTLER. Exception. That is all." (Transcript page 63.)

This same ruling was made in the case of *Sacramento Suburban Fruit Lands Company, a corporation, appellant, v. Paul and Ella Boucher, appellees,* No. 5655. We refer to the discussion contained in that brief and submit that on the authority of *Spring Valley Water W. v. Drinkhouse,* 92 Cal. 528, the error was erroneous and prejudicial.

III.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO THE QUESTION PROPOUNDED TO WITNESS LAMBERT HAGEL.

The main issue in the case was the adaptability of the tract of land to the production of fruit.

The plaintiff called Lambert Hagel, is the owner of a tract of land near that of appellee, and is very successful in producing fruit and vegetables in similar soil. He was familiar with the entire district and knew the location of the lands of appellee. It was only a mile and a half from his tract. The testimony and ruling was as follows:

> "Q. Do you know any reason why you cannot raise fruit and vegetables and grape-vines on that soil the same as you have on yours with proper attention?
>
> Mr. McCutchen. Objected to. I don't think the question—he says, 'Do you know any reason' why he couldn't.
>
> The Court. Sustained. He says he doesn't know anything about it.
>
> Mr. Butler. Exception. That is all." (Transcript page 67.)

The objection was addressed to the weight of the testimony and not its admissibility. The appellant was entitled to present to the jury the opinion of this practical farmer on this colony with reference to the Johnson land. It was a part of the tract with which he was familiar, and to exclude it on the ground that he had not been on the particular tract is unjustifiable. The Court was in error in suggesting in the ruling that the witness had stated that he did not know anything about the Johnson place.

IV.

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF THE WITNESS E. M. TRAXLER.

This witness had testified with reference to the land situated in the Arcade Park and similar to Rio Linda. Appellant was entitled to interrogate the witness in reference to the advantages of the land in Arcade Park as compared with those in Rio Linda. The testimony appears on page 23 of the transcript:

> "Q. Comparing again the lands in the Arcade Park District, what were those lands sold for?
>
> Mr. McCutchen. Objected to as incompetent, irrelevant and immaterial.
>
> Mr. Butler. Withdrawn. What was the reasonable value of that land on an acreage basis, in the Arcade Park section?
>
> Mr. McCutchen. Same objection. He is cross-examining his own expert.
>
> Mr. Butler. I think I have the right—that is withdrawn.
>
> Q. Do you have in the Arcade Park District any advantages which they have in Rio Linda?
>
> Mr. McCutchen. The same objection.
>
> The Court. Sustained.
>
> Mr. Huston. Exception." (Transcript page 81.)

V.

THE COURT ERRED IN STRIKING OUT PART 4 OF THE TESTIMONY OF THE WITNESS, M. A. CRINKLEY.

The testimony is as follows:

> "Q. You say that this land cost $85, and $100 an acre. As a matter of fact, wasn't that bought years before you became connected with the company?
>
> A. I already testified it was bought in 1911 and I became identified with the company in 1915.

Q. You didn't have anything to do with the sale? You weren't there when they made the transaction?

A. I wasn't there when they purchased the land.

Q. All you know about it is what somebody tells you?

A. Let me finish my answer.

Q. Of your own knowledge.

A. Yes, I know all about it.

Q. How do you know?

A. Mr. McCutchen, I came out in the year 1916 and paid to the Sacramento Valley Development Company several hundred thousand dollars in cash, and if a man doing that doesn't know about the transaction, I don't know——

Q. You don't know of your own knowledge what had been paid him?

A. If I don't, how would I know how much to pay him in 1916?

The COURT. Don't argue.

The WITNESS. Now your Honor, it is not fair——

The COURT. He is asking you if what you knew, you knew by hearsay.

A. No, sir, it is hardly hearsay.

The COURT. No argument.

Mr. MCCUTCHEN. I move to strike his testimony as to what was paid for the land.

The COURT. It will be stricken.

Mr. HUSTON. Exception." (Transcript pages 102-103.)

It is apparent from the statements of the witness that the testimony was not hearsay.

VI.

THE COURT ERRED IN INSTRUCTING THE JURY UPON THE SUBJECT OF THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY THE APPELLANT.

This assignment deals with the instructions of the Court upon the subject matter of the pamphlet. The pamphlet in this case is the same as that involved in the appeal of *Sacramento Suburban Fruit Lands Company, a corporation, appellant, v. R. B. Loucks,* No. 5657.

This charge is subject to the same criticisms as offered in the brief in that case and we make the same a part hereof by reference, without burdening the Court with the repetition of it.

VII.

THE COURT ERRED IN REFUSING TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON THE QUESTION OF INTENT.

Reading as follows:

> "The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud. It must appear from a preponderance of the evidence that the false representations, if any, were made by defendant with a fraudulent intent, and for the purpose of inducing the plaintiff to act upon them." (Transcript page 108.)

This subject has likewise been discussed in the *Walter A. Milen* and other appeals, and the Court is now familiar with the position of the appellant and for that reason the argument will not be repeated.

VIII.

THE COURT ERRED IN INSTRUCTING THE JURY RELATIVE TO THE SUBJECT OF INDUCEMENT.

> "So if you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff, and influenced him to buy, then you proceed to the next step, which is: Did the defendant know of the falsity of the representations, if they were false, which we will come to later? In these books they represented that it was already proven that the land was adapted to the commercial raising of fruit. There they state it as a fact. If it was not, it ought to be inferred that they knew, because they had every opportunity to know. The land was there. Moreover, if they didn't know it was false, all under the circumstances, considering their relation to the land and their opportunities and their general knowledge, if they ought to have known, it is the same thing as if they did know, because no one inducing another to enter into a bargain can make a positive assertion of fact contrary to the truth if they are culpably negligent in not knowing the truth, and I think you will agree the defendant was in this particular case. That is for your judgment, moulding it by what you would know or ought to know in like circumstances if you were in the position of a company thus handling and dealing with lands over a period of ten years." (Transcript page 122.)

This subject of inducement has also been discussed and the particular point is that appellee was given the right of exchange by his contract. He arrived in California, inspected the property, also had every opportunity to investigate the truthfulness of the statement relative to market value. This instruction, unlike those given in many of the other cases, specifically, told the jury that the Court thought it would agree

that the defendant was negligent in not knowing the truth in this particular.

IX.

THE COURT ERRED IN REFUSING THE INSTRUCTION OF THE APPELLANT ON THE SUBJECT OF THE STATUTE OF LIMITATIONS, AND IN THE INSTRUCTIONS GIVEN BY THE COURT UPON THAT SUBJECT.

Appellant proposed the following instruction upon the statute of limitations:

> "You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiff must show that the fraud occurred within three years of the commencement of his action for relief, or if his action was commenced more than three years after the fraud occurred, then he must show, in order to maintain his suit, that he did not discover he had been defrauded until a date within three years of the time he commenced his action.
>
> With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiff will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.
>
> You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiff has proven by a preponderance of the evidence both that he did not discover the alleged fraud within the period of three years before he filed his action, and that he could not have discovered it by the exercise of reasonable diligence, three years before he commenced this suit. He was not permitted to remain inactive

after the transaction was completed, but it was his duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to him. He is not excused from the making of such discovery even if the plaintiff in such action remains silent. A claim by the plaintiff of ignorance at one time of the alleged fraud and of knowledge at a time within three years of the commencement of his action is not sufficient; a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiff contracted with defendant to buy land. Plaintiff commenced his action on 11th day of August, 1927; his contract with the defendant for the purchase of its land was made in February, 1923. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiff in the making of this contract, then before you can find a verdict in his favor, you must also believe from a preponderance of the evidence that he neither knew of the fraud nor could with reasonable diligence have discovered the fraud before a date three years prior to the commencement of his action, that is, before the 11th day of August, 1924. If you believe from a preponderance of the evidence that plaintiff either knew of the facts constituting the alleged fraud before August 11th, 1924, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant." (Transcript page 109.)

This question is fully presented and argued on a similar instruction proposed and refused, and also the instruction as given by the Court in the case of

Sacramento Suburban Fruit Lands Company (a corporation), appellant, v. R. B. Loucks, appellee, No. 5657. In this case the appellee took possession of the land May 18, 1923, and he has since continuously occupied the same. He did not make a final selection of his lot until after he had been taken over the colony and shown various places. His wife wrote to a Mrs. Olsen. He was shown certain orchards. He says he did not ask a single settler about the fruit. Is not this strange that a man who was so strongly impressed with the representations of the adaptability of this land to the production of all kinds of fruit, should come to California, should visit the land and not make an inquiry upon the subject? He would impress the Court that he was very enthusiastic on the subject of fruit culture. On page 33 of the transcript, he testified as follows:

> "After my talk with representatives of the Company in the east I had in my mind the picture that the Rio Linda Colony was principally devoted to raising orchards. When I came out here I actually found probably a small part of it devoted to raising orchards."

Yet appellee asked no questions and made no investigations, but selected another lot and continued in the possession thereof until 1927 without any complaint to the appellant, or any intimation to any one that he had been defrauded. He then suddenly discovered the fraud although as we pointed out in the appeal in the case of *Miller,* No. 5670, he was able to detect the fraud within a few months. On page 34 of the transcript appellee says:

"I don't know anything about trees and the production of fruit in commercial quantities, so I can't tell you that when I arrived here I found any orchard in Rio Linda which appeared to be producing fruit in commercial quantities."

The story of this appellee is absurd. He was ignorant of many things, matters of which are common knowledge. Any ordinary man can, by observation, form some opinion whether a given section of country is being devoted to the commercial production of fruit. We call attention to his evasion on this subject in the following testimony taken from page 34 of the transcript:

"Q. And now I will ask you once more and then leave it alone. When you arrived here, where did you find any orchard in the Rio Linda district which looked to you like they were producing fruit in commercial quantities?

A. I couldn't tell you because on the Fisher and the creek bottom place Hornbrocker.

Q. How many acres did they cover?

A. I don't know.

Q. Small acres? Ten acres or such? Small orchards?

A. I guess it is more.

Q. How many?

A. Possibly ten or twenty, I don't know.

Q. Outside of that when you arrived here did you find any orchards that looked to you like they were producing fruit commercially?

A. At that time I didn't see any others, because he didn't show me anything else.

Q. During the year after your arrival did you see any orchard on this colony which looked to you like they were producing fruit in commercial quantities?

A. Well, down on the creek bottom.

Q. And about how many acres?

A. I don't know how many acres.
Q. Five hundred or two hundred?
A. I don't know.
Q. Outside of what you saw on the creek bottom, you didn't see any orchards on the Rio Linda colony that looked to you like they were producing fruit in commercial quantities during the first year you were here?
A. I went by Fisher's place and the Terkelson place.
Q. I mean outside of the places that you mentioned?
A. That's what I say.
Q. That's all you saw?
A. Some other. Those I saw around there."

Like all the other plaintiffs he seems to have forgotten all about the representation as to the value of the property until 1927. Can it be said that the plaintiff, by use of reasonable diligence, could not have discovered his alleged misrepresentations as to value? As stated in the case of *Stockton v. Hine,* 51 Cal. App. 131, if the appellant was false in one representation, appellee could only conclude that it was false in all. In all these cases the plaintiffs were strangely silent upon the subject of their failure to discover the representations as to value. That point is practically ignored in every charge of the Court. What has been said in the other briefs referred to and made a part hereof, applies to this case.

The instruction of the Court upon the subject is a very strong argument which excuses action on the part of the appellant and convinces the jury that he had exercised proper diligence.

Again, the charge contains some statements that are not the law. For instance, that part of the charge

relative to hardpan, and the fact that the plaintiff was not a farmer. Also, the statement that he was not obliged to grasp and believe anybody's statement if he heard that the lands were not adapted to the commercial orchards, and: "He would have from five to seven years according to defendant's theory to test it out, if he didn't otherwise find out, that it wasn't adapted to commercial orchards." In this language the Court plainly instructed the jury that the statute of limitations would not be a bar until after the appellee had made a test from five to seven years, unless he otherwise learned that the land was not adaptable to commercial orchards. There is no such qualification in any of the decisions. This is especially emphasized that the Court throughout these charges has sustained the position of the appellee that all of the lands in the colony were represented as being adaptable to the commercial production of fruit in profitable quantities. In fact, the complaint makes this distinct allegation. The Court narrows the duty of exercising diligence to a test of five to seven years, by the actual planting of an orchard on the land purchased. Suppose the plaintiff had not planted any orchard. Under this rule the statute would never run until the plaintiff planted an orchard. His duty to exercise reasonable diligence applied to all of the representations, and to say that he is excused until he had made a test of the particular tract, is in conflict with the authorities.

This charge is also subject to the same objections urged in the other cases that it is argumentative, and favorable to the appellee and unfavorable to appellant. It also singles out the witnesses of appellant and sub-

jects them to criticisms. It omits favorable reference to any of the appellant's witnesses, and in fact, no reference is made to some of its most important witnesses.

The effect of this charge is manifested by the fact that a verdict was rendered in favor of the plaintiff in all of these cases, although in some of them writings of the plaintiff were introduced in evidence absolutely and flatly contradicting the sworn allegations of the complaint. Some of the plaintiffs were experienced farmers and others were not. Yet their experience is identical. It seems almost a miracle that there should be some thirty transactions relative to these lands and in not a single instance where the question of the statute of limitations was involved, was a single party able to discover the misrepresentation as to value, or the colony being adapted to the commercial raising of fruit, or that the land sold was also adaptable to fruit, until 1927. Is this a coincidence, or a shining example of the value of cooperative litigation?

We respectfully submit that the judgment should be reversed.

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No. 5692

IN THE

United States Circuit Court of Appeals

For the Ninth District

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a corporation,

Appellant,

vs.

EMIL JOHNSON,

Appellee.

BRIEF OF APPELLEE

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TABLE OF AUTHORITIES CITED

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No. 5692

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BRIEF OF APPELLEE

The facts in this case are almost identical with those involved in *Sacramento Suburban Fruit Lands Company* vs. *Elm,* 29 Fed. (2d) 233, and *Wellnitz* vs. *Sacramento Suburban Fruit Lands Company,* 274 Pac. 1016, and *Melin* vs. *Sacramento Suburban Fruit Lands Company,* No. 5671, the appeal of which is pending in this Court. All of these cases arose out of sales made by the appellant under a uniform scheme of representation and colonization of certain lands to the northward of the City of Sacramento, California.

I.

WHETHER OR NOT THE COURT ERRED IN OVERRULING THE DEMURRER TO THE COMPLAINT.

The demurrer was overruled *by consent,* no exception

was taken thereto, and the subject of limitations urged by appellant was not raised in the demurrer. The complaint alleges non-residence, which tolls the running of the statute.

Melin Brief, page 3.

II.

WHETHER OR NOT THE COURT ERRED IN SUSTAINING AN OBJECTION TO A QUESTION PROPOUNDED TO A WITNESS AS TO THE VALUE OF LAND IN THE DISTRICT WHERE THE LAND IN QUESTION WAS LOCATED.

(a) The mere quotation of the question, answers this point. It would certainly be incompetent, irrelevant and immaterial what the value of the land *in that district* was at any time. The point in issue, is the value of the particular land.

(b) The witness was poultryman. He had lived in the district six years. He testified that he *knew* the *present values* of land in the district, not the value in 1923. The court could do little else than sustain the objection.

(c) As to whether or not an expert witness has qualified himself to give an opinion, is largely a matter within the discretion of the trial court.

Kirstein vs. *Bekins,* 27 Cal. App. 586.
Hood vs. *Bekins Van & Storage Co.* 178 Cal 150 at 152; 172 Pac. 594.
Willard vs. *Valley Gas & Fuel Co.* 171 Cal 9; 151 Pac. 286.

The case relied upon, *Spring Valley Water Co.* vs. *Drinkhouse,* 92 Cal. 528, was a case where the owner

of property for twenty years was not allowed to give an opinion thereon. There is a distinction between the owner and other persons.

10 Cal. Jur. 1023.
McGowan vs. *Burg Bros.* 210 Pac. 545 at 547; 59 Cal. App. 219.

III.

WHETHER OR NOT THE COURT ERRED IN SUSTAINING AN OBJECTION TO A QUESTION CALLING FOR THE OPINION OF A WITNESS ASKED AS TO THE RAISING OF FRUIT UPON LAND WITH WHICH THE WITNESS WAS NOT FAMILIAR.

(a) The witness had not shown by his testimony that he knew anything about the Emil Johnson place. The only thing he said was that he knew its location. Whether or not he knew of any reason why fruit could not be grown would certainly not be relevant. There would not be a person in the world who could not say that he did not know of any reason why fruit could not be grown upon the Emil Johnson place if he were unfamiliar with the place. In fact, he would know nothing about it.

IV.

WHETHER OR NOT THE COURT ERRED IN EXCLUDING TESTIMONY OF THE WITNESS E. M. TRAXLER.

Appellant here was clearly attempting to prove specific instances of sales of lands in another district by its own witnesses upon direct examination. This clearly not

admissible.

10 Cal. Jur. 1027.
Estate of Ross, 171 Cal. 64, 151 Pac. 1138.

It will be observed that the only question which was not expressly withdrawn by appellant in the portion of the testimony quoted under this point, is the question as to what advantages were had in Arcade Park District which they had in Rio Linda.

V.

WHETHER OR NOT THE COURT ERRED IN STRIKING OUT THE TESTIMONY OF THE WITNESS CRINKLEY CONCERNING THE PURCHASE PRICE OF THE LAND.

It appears by the testimony of the witness Crinkley, (Transcript, pages 102-103) that the land was purchased in 1911. He became connected with appellant in 1915. His whole knowledge is based upon certain payments made by him in 1916. Of course, he could not give testimony about a transaction occurring four or five years before he had any knowledge of it.

VI.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY UPON THE SUBJECT OF REPRESENTATIONS MADE IN THE PAMPHLET.

For its argument in this matter, appellant makes reference to the Loucks case No. 5657. Therein we have answered it. We have also answered the same arguments in practically all the other briefs.

VII.

WHETHER OR NOT THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S PROPOSED INSTRUCTION UPON THE QUESTION OF INTENT.

(a) There was no exception taken to the failure of the Court to give this instruction, except as follows:

> "and the neglect of the Court to instruct on the question of intent."

That is insufficient.

(b) The offered instruction is erroneous, as it does not cover the subject, nor explain when there need be no intent.

Spreckels vs. *Gorrill,* 152 Cal. 383.

(c) The court's "further" instruction upon the subject covered the matter. (Transcript, page 139.) No further exceptions were taken thereafter.

VIII.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY RELATIVE TO THE SUBJECT OF INDUCEMENT.

(a) The only exception taken is as follows:

> "Except to the Court's instruction on the question of belief of plaintiff in the representations as an inducement and the representations having been made to induce him to buy." (Transcript, page 138.)

The exception is insufficient.

(b) The court's instruction upon the subject are eminently correct. The only part of the instruction quoted by appellant under this title which relates to

inducement is the first four lines thereof. The balance related to representations made positively by a person presuming to know whether or not they were true. Following is all of the reference made in the criticized instruction to the subject of inducement:

> "If you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff and influenced him to buy, then you proceed to the next step." (Transcript, page 122.)

The next step outlined was whether or not the defendant knew of the falsity of the representations or is bound to know under the circumstances and its manner of making the representations. The criticism of appellant is directed at the statement of the court that appellant should know facts to be true before it made positive representations about them.

IX.

WHETHER OR NOT THE COURT ERRED IN REFUSING THE INSTRUCTION OF APPELLANT ON THE SUBJECT OF THE STATUTE OF LIMITATIONS, AND IN THE INSTRUCTIONS GIVEN BY THE COURT UPON THAT SUBJECT.

(a) The only exception taken to the foregoing is as follows:

> "Except to the Court's instructions on the question of the statute of limitations, and the refusal of the Court to give instructions on the statute of limitations as proposed by defendant." (Transcript, page 139.)

As we pointed out in the Melin Brief, page 19 the exception is insufficient.

(b) As we pointed out in the Melin Brief, page 15 the defendant is a foreign corporation, non-resident of the State of California, and not entitled to the benefit of the California statute of limitations.

(c) The proposed instruction is erroneous. It states, in effect that appellee was not permitted to remain inactive after the transaction was completed, but it was his duty to "exercise reasonable diligence" to ascertain the truth of the facts alleged to have been represented to him.

This is not a true statement of the law. The party is not required to make an investigation as to the character of land misrepresented until there is some fact or circumstance brought to his attention which would tend to put him upon inquiry. The offered instruction should have that qualification.

McMahon vs. *Grimes,* 77 C. D.; 275 Pac. 440 at 445.

The court's instructions upon the subject of the statute of limitations are fair and ample (135, 136, 137 and 138, Transcript.)

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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